Supreme Court, U.S.
FILED
00-373 SEP 8 2000
OFFICE OF THE CLERK

No. 00-

IN THE
Supreme Court of the United States

COMMANDER OIL CORP.,

Petitioner,

v.

BARLO EQUIPMENT CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether a tenant/sublandlord who rents a portion of its premises to the polluter and fails to exercise its authority and control over the site to prevent the contamination is a "covered person" within the meaning of 42 U.S.C. § 9607(a)(1) and thus a party liable in contribution within the meaning of 42 U.S.C. § 9613(f)(1).

PARTIES TO THE PROCEEDING

Petitioner Commander Oil Corporation ("Commander") states that the parties to the proceeding are Petitioner, Commander, and Respondent Barlo Equipment Corporation ("Barlo"). All of the other original parties to this action in the District Court have either settled out, defaulted or had the claims against them dismissed. Only Commander and Barlo are present before the Supreme Court.

STATEMENT PURSUANT TO RULE 29.6

Commander has no corporate parent and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioner, Commander Oil Corporation ("Commander"), respectfully requests that a Writ of Certiorari be issued to review the Decision and Judgment of the United States Court of Appeals for the Second Circuit rendered in this case on June 12, 2000.

OPINIONS BELOW

The Decision and Judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed herein, is reported at 215 F.3d 321 (2d Cir. 2000), and appears at page 1a in the Appendix to this Petition. ("Pet. App.").

In rendering its decision, the United States Court of Appeals for the Second Circuit reversed several companion decisions of the United States District Court for the Eastern District of New York (Honorable Jacob Mishler), to wit:

1. Judge Mishler's Memorandum of Decision and Order, dated June 10, 1997, which granted, *inter alia*, partial summary judgment to Commander on the issue of liability against its tenant, Barlo Equipment Corp. ("Barlo"), the Respondent herein, which Decision is reproduced at Pet. App., page 40a;

2. Judge Mishler's Memorandum of Decision and Order, dated May 20, 1998, in which, following a bench trial, the Court granted judgment to Commander as against Barlo in the amount of $802,915, which Decision is reproduced at Pet. App., page 28a; and

3. Judge Mishler's Memorandum of Decision and Order of July 6, 1998, which denied Barlo's motion for reargument

based on this Court's then recent decision in *United States v. BestFoods*, 524 U.S. 51 (1998). This decision of Judge Mishler denying reargument is reproduced at Pet. App., page 24a.

STATEMENT OF JURISDICTION

The decision and judgment of the United States Court of Appeals for the Second Circuit was entered on June 12, 2000. There have been no subsequent orders concerning rehearing or extensions of time within which a petition to this Court may be filed. The time within which to file this petition extends to September 11, 2000.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") is codified at 42 U.S.C. § 9601 *et seq.* CERCLA's relevant definitions include the following:

> The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local

> government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A) (Supp. 2000).

Section 9607(a) identifies those parties who may be held liable for recoverable costs and damages for remediation of environmentally contaminated sites. In relevant part, the statute provides that liability is imposed on the following "covered persons":

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurrred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

* * *

42 U.S.C. § 9607(a).

Finally, section 9613(f) allows parties held liable for CERCLA response costs to bring a civil proceeding to recover in contribution from other responsible parties.

(1) Contribution

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1).

STATEMENT OF THE CASE

The fundamental issue presented to the Court for determination in this case is whether and under what circumstances a tenant, who sublets a portion of the leased premises to a subtenant who then contaminates the property, should be answerable in damages for a portion of the cleanup costs under the "owner" liability provisions of CERCLA. The District Court imposed such liability herein and the Second Circuit overturned that judgment.

The property in question is a 75-foot by 275-foot parcel which has been owned by Commander since 1963. From 1972 through 1989 Commander leased the facility, which later came to be known as the Pasley Chemicals & Solvents Superfund Site, to its tenant, Barlo. Over the course of its seventeen years as lessee of the site, Barlo enjoyed the rights and bore the obligations of ownership and exercised control over and responsibility for the use of the site (A. 642).

By leases executed in 1972 and 1977, Commander granted Barlo the right to sublet its interest in the site, (A. 643), and on February 1, 1973, Barlo subleased the site to Pasley Chemicals & Solvents Corp. ("Pasley") (A. 643).

It subsequently came to light that during the term of Pasley's lease, its storage, transfer and disposal operations resulted in the release of various hazardous wastes at the site (A. 646). Although Pasley's operations at the site violated both State and County laws relating to the storage of hazardous wastes, and these violations occurred only a few feet from the office of Pasley's landlord — Barlo, Barlo did nothing to stop Pasley from continuing with its unlawful activities (A. 699).

In fact, Pasley's contaminating activities were not terminated until June 1982, after Pasley appeared in the Nassau County District Court and was directed to drain all storage tanks, to remove all product therefrom and to vacate the premises. As a result of the soil and groundwater contamination caused by Pasley's unlawful operations at the site, Commander's property was listed by the EPA as Site No. 380 on the National Priorities List established pursuant to Section 105(a) of CERCLA, 42 U.S.C. § 9605(a).

On April 11, 1990, Commander commenced this action seeking, *inter alia*, recovery of, and contribution for, past and future response costs and other relief from various defendants pursuant to CERCLA, the Resource Compensation and Recovery Act ("RCRA"), the New York Environmental Compensation Law ("ECL"), and various common-law theories of public and private nuisance, abnormally dangerous activities, trespass, negligence, and indemnification (A. 52, 240 at ¶ 15). The District Court had federal question subject matter jurisdiction under 28 U.S.C. § 1331. Subsequently, Commander entered into settlement negotiations with sixteen of the Potentially Responsible Parties ("PRPs"), which culminated in a Consent Decree entered into with the United States on January 26, 1996 (A. 110). Under the terms of the Consent Decree, which Barlo refused to join, Commander agreed to establish a Remedial Trust Fund to implement cleanup of the site and to reimburse the United States for its past and future response costs (A. 206). In settlement of claims against them, sixteen settling defendants paid $1,849,127.91 in contribution (A. 207). As a result of Barlo's refusal to join in the settlement, the underlying action continued.

After eight years of litigation, including a four-day bench trial to ascertain the extent and apportionment of damages in light of the relevant equitable factors and pursuant to section 9613(f)(1) of CERCLA, Judge Mishler determined that Commander's total net recoverable response costs in this action were $3,211,662, of which Barlo was allocated a 25% share, or $802,915 (A. 704).

By decision entered June 12, 2000, the Second Circuit reversed that part of Judge Mishler's decision which held Barlo liable as a CERCLA "owner" and affirmed that part of the decision which dismissed Commander's claims for indemnification and certain state-law causes of action (Pet. App. 1a).

REASONS FOR GRANTING THE WRIT

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") is one of the most significant congressional enactments of the 20th Century, addressing an issue described as "the most serious health and environmental challenge of the decade." S. Rep. No. 96-848, at 2 (1980). Regrettably, it has also been described as a statute which seeks to impose strict liability upon the owner of a facility but gives no helpful guidance for interpreting the breadth of "owner" liability: "It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its passage" (*Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988)), and requires the courts "to give content to a statutory tautology, a position to which we have become increasingly accustomed in the environmental context" (Second Circuit Opinion herein, Pet. App., page 9a).

This CERCLA tautology was recognized by this Court on the issue of "operator" liability in *United States v. BestFoods, et al.*, 524 U.S. 51, 56 (1998): This case presents the same tautology, but in the context of "owner" liability. This Court stated in *BestFoods* that CERCLA's tautological anomaly in the definition of "operator" was one of the reasons certiorari had been granted therein: "it is this bit of circularity that prompts our review." *Id.* That same reasoning should prompt the Court in this case to review the decision of the Second Circuit below and to address the congressional intent in its imposition of strict liability upon the "owner" of a facility.

Moreover, as the Second Circuit expressly acknowledged, its decision refusing to impose owner liability upon a tenant/sublandlord is at odds with most other federal court decisions which have considered the same issue. (Second Circuit Opinion, Pet. App., page 12a). This acknowledged confusion throughout the federal system warrants the intervention of this Court.

And finally, as recognized by the Second Circuit, because CERCLA is a remedial statute it must be liberally construed to effectuate the congressional intent to efficiently and expeditiously clean up contaminated properties and to impose liability, without fault, on those persons who are potentially responsible for the contamination, *i.e.*, the owners and operators of the facilities. The question raised here is whether the tenant/sublandlord of a contaminated facility — who was in possession of the adjoining property and had the legal obligation to supervise and control the acts of its subtenant — should be relieved of any liability for the contamination when the contaminating subtenant is defunct and the owner who was not in possession or control of the site has borne the full cost of cleanup. Judge Mishler after trial assigned a 25% contribution to such a tenant/sublandlord, standing in the shoes of an owner, and it is that judgment which should be reviewed and reinstated by this Court.

For all of these reasons, and particularly because the federal courts need guidance on the application of CERCLA "owner" liability in the landlord/tenant context, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

I.

AS THIS COURT DID IN *BESTFOODS* ON THE ISSUE OF "OPERATOR" LIABILITY UNDER CERCLA, IN THIS CASE THE COURT SHOULD ADDRESS THE ISSUE OF "OWNER" LIABILITY UNDER CERCLA:

A. In order to remedy the tautology created by the definition of "owner" in CERCLA;

B. In order to resolve the conflict among the federal courts regarding the imposition of "owner" liability upon a tenant/sublandlord; and

C. In order to achieve consistency with *BestFoods* on the issues of "owner" and "operator" liability under CERCLA.

A. The Court should assist the bench, the bar and the environmental community in fleshing out the tautological definition of "owner" in CERCLA.

As this Court indicated in *BestFoods*, CERCLA was enacted in 1980 in response to the serious environmental and health risks posed by industrial pollution. The statutory scheme anticipates liability without fault being imposed upon various categories of "potentially responsible parties" in order to accomplish expeditious remediation of contaminated facilities. The categories of potentially responsible parties are defined in § 9607 of CERCLA as follows:

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility

> at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs . . .

42 U.S.C. § 9607(a). And § 9601(20)(A) unhelpfully defines the term "owner or operator" as the person who "owns" or "operates" the contaminated facility.

In this case, petitioner Commander is the owner of property which it leased to respondent Barlo, who in turn subleased a portion of the premises to Pasley, the actual contaminator of the property. As a result of the contamination, Commander has spent in excess of $7 million cleaning up the property, $5 million of which was found by Judge Mishler to be recoverable response costs under CERCLA. After certain settlement amounts were deducted from the recoverable total, Judge Mishler entered judgment for Commander against Pasley in the amount of $3,211,662, and assessed Barlo's liability at 25% of the total, or $802,915.

The legal issue confronted by the District Court was whether a tenant/sublandlord, a category of party not identified in CERCLA, could be held liable as if it were the "owner" of property which it had sublet to the contaminator. In other words, the question was whether, and under what circumstances, a tenant/sublandlord could be liable under CERCLA as a potentially responsible party, *i.e.*, "owner."

Consistent with many decisions throughout the country, the District Court answered the question in the affirmative, and imposed "owner" liability upon Barlo. Judge Mishler noted that the statute has consistently been given a liberal reading in this regard in order to serve CERCLA's broad remedial purpose. Pet. App., page 54a (citing *Stilloe v. Almy Bros., Inc.*, 759 F. Supp. 95 (N.D.N.Y. 1991); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985)). Judge Mishler further noted that "rather than limiting liability to record owners of the property in question, courts have inquired as to a defendant's degree of authority and control over the facility" and have concluded that lessees with control and responsibility over the property were responsible under CERCLA. Pet. App., page 55a (citing *United States. v. A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317, 1332-33 (S.D.N.Y. 1992); *Nurad v. William E. Hooper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1985), *aff'd sub nom. in part, vacated in part, United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988)).

The United States Court of Appeals for the Second Circuit, after acknowledging the many decisions of the federal courts which had reached conclusions similar to that of Judge Mishler on similar facts, nevertheless departed from those decisions and reached the opposite conclusion.

Rejecting the theory that the term "owner" in CERCLA should extend beyond the fee or record owner to a party possessing the requisite degree of **control** over the facility, the Court confused the concepts of "owner" and "operator" liability, concluding that the imposition of "owner" liability instead of "operator" liability "threatens to conflate two statutorily distinct categories of potentially responsible parties." (Second Circuit Opinion, Pet. App., page 13a.) After quoting this Court in *BestFoods* as indicating that "an operator must manage, direct, or conduct operations specifically related to pollution," the Court then erroneously concluded that "if control over a facility could establish ownership then operator liability in these circumstances would be just a subset of owner liability." According to the Court: "Imposing owner liability on the basis of site control threatens to make owners of all operators and surplusage of most of operator liability." (Second Circuit Opinion, Pet. App., page 13a.)

Nothing could be more unfounded or less accurate.

In point of fact, while "operator" liability may well, and should, depend upon the operations performed at the site, owner liability is otherwise. In a very real sense "owner" liability is based upon status, upon the concept of the right to control the activities on the property, whether that power is exercised or not. In fact in this case, Judge Mishler concluded that Barlo (a) had the right and the duty to control any contaminating activities of its subtenant Pasley, and (b) neglected that duty and allowed the contamination to take place under its very nose without the kind of intervention that the law expects from the owner of property.

As this Court stated in *BestFoods*, CERCLA unfortunately is not a model of legislative draftsmanship and the circularity of its defining the phrase "owner or operator" as "any person owning or operating a facility" prompted the Court in that case to review the determination of the United States Court of Appeals for the Sixth Circuit. It is respectfully submitted that that same circularity regarding in this instance not the definition of "operator" but rather the definition of "owner" should prompt a similar review by this Court.

B. This case presents the Court with the opportunity to resolve a conflict among the various federal courts regarding the imposition of owner liability upon a tenant/sublandlord.

A conflict in the application of a significant federal statute among the federal courts throughout this land is a significant reason for this Court to grant certiorari and to resolve the conflict. Such a conflict prompted the Court to grant certiorari in *BestFoods*. Such a conflict exists here, and warrants the intervention of this Court.

Commander's suit against Barlo seeks contribution and/or indemnity for the costs it has and will continue to incur under the Consent Decree it entered into with the United States. Judge Mishler granted partial summary judgment to Commander for contribution on the theory that Barlo, as a tenant/sublandlord, stood in the shoes of an "owner" of the site and was therefore strictly liable for a portion of the cleanup costs under CERCLA. And the Second Circuit Court of Appeals acknowledged that "[o]ther courts to have considered whether lessees/sublessors are owners for purposes of CERCLA's strict owner liability provisions have reached the same conclusion on similar facts." Second Circuit

Opinion herein, Pet. App., page 8a (citing *Delaney v. Town of Carmel*, 55 F. Supp.2d 237, 258-59 (S.D.N.Y. 1999); *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1332-34 (S.D.N.Y. 1992); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1002-03 (D.S.C. 1984), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988)). Moreover, a similar result was reached in July of this year by the District Court for the District of Hawaii, where the Court concluded that the tenant had maintained sufficient control and possessory interests in the site in order to be considered an "owner" (as well as an "operator") under CERCLA (referring to but not following the Second Circuit's decision in this case). *See Servco Pacific, Inc. v. Dods*, No. 98-00272, 2000 WL 1048586 (D. Hawaii, July 12, 2000).

Despite this apparent unanimity among the District Courts and at least one other Circuit Court of Appeals, the Second Circuit has charted a different path. Despite acknowledging that CERCLA should be broadly construed so as to address the environmental problems which Congress sought to remediate, the Court contrariwise indicated that the strict liability concept of CERCLA should be a "narrowly tailored tool capturing a specific kind of responsibility" which it did not find in this case. Regrettably, the Second Circuit went astray in relying upon such ephemeral (and unsubstantiated) concepts as the "sophisticated lessee/sublessor who exploits unanticipated risks on the property of an unsophisticated owner," concluding that such a situation did not exist in this case. (We do not know whether such situation existed or not, since there was no evidence in the record before Judge Mishler on that issue.) Moreover, the Court ventured into uncharted waters when it opined that a buyer, rather than a lessee, will evaluate the environmental condition of a facility before determining to go

forward with the transaction. While there was nothing in the record to substantiate this analysis, nor was there any judicial authority referenced by the court, it is common knowledge among those who practice environmental law that a lessee may well be just as concerned about contamination of the property it is leasing as is a prospective buyer seeking to purchase the same site. Neither wants to be saddled with someone else's earlier contamination of the property. According to the Second Circuit, while Barlo possessed some attributes of ownership with respect to the site (the duty to secure insurance, liability for assessments and increases in taxes, responsibility for all nonstructural repairs, including cesspool maintenance, driveway parking area and pavement repairs, etc.), "Barlo lacked most of the bundle of rights that comes with ownership of property," and "we are reluctant to surprise Barlo with new and unexpected liability, and to undermine the security of lessees/sublessors throughout the circuit who have entered into subleases before this decision."

It is respectfully submitted that this faulty analysis, at odds with almost all of the other federal decisions on the same issue, warrants this Court's review of the decision of the Second Circuit herein.

C. Harmony with the *BestFoods* analysis, not found in the decision of the Second Circuit, can and should be achieved in this case.

The Second Circuit's decision herein is inconsistent with this Court's analysis in *BestFoods* and should be reviewed so that such consistency can be achieved (or, alternatively, be deemed unnecessary despite the importance of CERCLA and the consistent application of the Superfund law).

In *United States v. BestFoods*, 524 U.S. 51 (1998), this Court considered the "actual control test" under CERCLA in the context of determining whether a parent corporation could be held liable as an "operator." The Court expressly rejected an analysis which focused on parental control over its subsidiary and determined that the correct focus must be on the parent corporation's activities which demonstrated control *over the facility itself*. *See id.* at 67. "The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is *evidenced by participation in the activities of the facility*, not the subsidiary." *Id.* at 67-68 (*quoting* Oswald, *Bifurcation of the Owner and Operator Analysis under CERCLA*, 72 WASH. U.L.Q. 223, 269 (1994)) (emphasis added)). Significantly, in *BestFoods* the District Court was found to have "mistaken[ly] . . . rest[ed] its analysis" on the relationship between the parent and the subsidiary when, in order to determine if the parent was liable, it "should have instead have rested on the relationship" between the parent and the facility. *Id.* at 68.

In *Commander v. Barlo*, the Second Circuit was similarly mistaken in resting its analysis of "owner" liability on the relationship between Commander and Barlo, both PRPs within the meaning of CERCLA, rather than on the extent of each party's control over or opportunity and obligation to control the contaminating facility.

It is respectfully submitted that the appropriate test to determine whether a lessee/sublessor should be liable in contribution as "owner" is the degree of control and responsibility it has over the contaminated property. In fact, this has been the test applied by numerous courts which have held lessees/sublessors liable as owners under CERCLA.

See, e.g., United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317 (S.D.N.Y. 1992); *see also*, Second Circuit Opinion herein, Pet. App., page 8a. On July 12, 2000, the United States District Court in Hawaii held that both the fee owner of the contaminated site and the current lessee were liable as CERCLA owners, finding "as a matter of law that [the lessee] maintains sufficient control and possessory interests in the Property to be an "owner" (and "operator") as those terms are defined and interpreted in CERCLA." *Servco Pacific, Inc. v. Dods*, No. 98-00272, 2000 WL 1048586, at *10 (D. Hawaii, July 12, 2000); *see also Louisiana v. Braselman Corp.*, 78 F. Supp.2d 543, 551 (E.D. La 1999) ("Even though NONER did not have title to the property, NONER was a lessee who asserted control over the property and, as such, was an 'owner' for purposes of § 9607(a)(1)"); *Burlington Northern v. Woods Indus.*, 815 F. Supp. 1384, 1391 (E.D.Wash. 1993) ("Since Hansen asserted control over the use of the property, Hansen is considered the 'owner' for purposes of § 9607(a)(1) even though it is only a lessee"). These decisions are **consistent** with this court's analysis in *BestFoods*, and are **inconsistent** with the Second Circuit's rationale herein.

For this reason it is appropriate for this Court to grant this Writ so that the corollary to *BestFoods* can be handed down in the next Term of this Court.

II.

RELIEVING LESSEES OF LIABILITY IN CONTRIBUTION UNDER CERCLA UNDERMINES CERCLA'S POLICY OF EQUITABLE ALLOCATION OF CLEANUP COSTS

In enacting CERCLA's scheme of strict, joint and several liability, Congress sought to assure that those who caused or contributed to environmental contamination, as well as benefitted from associated commercial activity, would be held accountable. *See* S. Rep. 96-848, at 12 (1980). Issues of fairness and equity were chief among the reasons for imposing strict, joint and several liability. *Id.* at 33. In furtherance of these equitable principles, Congress amended CERCLA in 1986 to include a provision which expressly created a cause of action for contribution. *See* 42 U.S.C. § 9613(f). It thus gave the congressional stamp of approval to several decisions which had allowed parties which were strictly liable under CERCLA and which had borne alone the financial burden of remediation to obtain contribution from other responsible parties.

This Court has noted that CERCLA's contribution provision, 42 U.S.C. § 9613(f)(1), serves CERCLA's two main purposes: the " 'prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.' " *Meghrig v. KFC Western, Inc.* 516 U.S. 479, 483-85 (1996). As articulated by Congress in enacting the contribution provision, Section 113 serves to "clarify and confirm the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or costs that may be greater than its

equitable share under the circumstances." H.R. Rep. No. 99-253(I), at 79 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861; *see also Burnette v. Carothers*, 192 F.3d 52, 58 (2d Cir. 1999). In allocating such equitable shares, the district courts consider such factors as the financial status of the parties, the degree of involvement of the parties in contributing to the discharge or release of hazardous substances, knowledge of contaminating activities and financial benefits received as a result, and the degree of cooperation by the parties with State and Federal officials. *See Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121 (D. Or. 1996); *Farmland Indus., Inc. v. Colorado & Eastern R. Co.*, 944 F. Supp. 1492 (D. Colo. 1996); *Catellus Develop. Corp. v. L.D. McFarland Co.*, 910 F. Supp. 1509 (D. Or. 1995).

It is thus respectfully submitted that judicial interpretation of CERCLA which completely absolves from liability a tenant/sublandlord who holds a possessory interest in property which is contaminated during the leasehold severely undermines CERCLA's remedial goals. Under the Second Circuit's reading of CERCLA, an on-site lessee which subleases a portion of its leasehold to a judgment-proof polluter may insulate itself "by virtue of its passivity." *Nurad Inc. v. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992). This holding clearly frustrates CERCLA's remedial purpose and ignores the equitable factors applied by the courts to apportion liability. *Cf. id.* at 845-46 (rejecting the argument that actual proof of disposal by former owners was required as it would create a "regime which [would] reward indifference to environmental hazards and discourage voluntary efforts at waste cleanup"). Moreover, the Second Circuit's decision sends a dangerous message to lessees who simply choose to ignore hazardous waste practices by

sublessees. Notably, just two days after the Second Circuit rendered its decision in *Commander*, an article summarizing the decision appeared on the front page of the New York Law Journal under the headline, "Lessee Avoids CERCLA Liability." And the Andrew's Hazardous Waste Litigation Reporter of July 10, 2000, in its front page highlights, described the Second Circuit's decision as ruling that a tenant/sublandlord cannot be held liable under CERCLA "unless it is the lawful owner."

The Second Circuit's holding in *Commander* obfuscates the remedial purpose sought by CERCLA by establishing an ambiguous and unworkable test which will enable on-site lessees to completely avoid CERCLA liability. Furthermore, a legal rule which so insulates lessees effectively forecloses record owners who have acted responsibly in remediating environmentally contaminated sites from the opportunity to recover any portion of their response costs from the one who had the best chance to prevent or halt the contamination — the onsite tenant/ sublandlord. This rule undermines CERCLA's policy of equitable allocation of costs, rewards indifference and may well have a chilling effect on the future of voluntary environmental remediation.

CONCLUSION

This case presents a question of significant national importance — whether tenants/sublandlords of environmentally contaminated properties may be held liable as "owners" within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act. Although federal courts in imposing such liability have consistently and rationally considered actual control of, as well as authority to control, the possession and use of the contaminated property, the Court of Appeals for the Second Circuit has rejected this approach, instead preferring a strict, narrow reading of the statute. In spite of CERCLA's broad remedial purpose of encouraging prompt, voluntary cleanup of hazardous waste sites, and the liberal reading it has been given by most courts including the Supreme Court, the Second Circuit has significantly narrowed the scope of CERCLA by abandoning the control analysis utilized by this Court in *BestFoods* and employing an amorphous test which has already created confusion among the federal courts, the bar, and the regulated community. Guidance from this Court is needed, and is sought herein.

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JUNE 12, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1999

(Argued October 19, 1999 Decided June 12, 2000)

Docket Nos. 98-7975(L), 98-9075(xap)

COMMANDER OIL CORP.,

Plaintiff-Counter-Defendant-Appellee-Cross-Appellant,

— v. —

BARLO EQUIPMENT CORP.,

Defendant-Appellant-Cross-Appellee,

ADVANCE FOOD SERVICE EQUIPMENT ET AL.,

Defendants-Counter-Claimants,

JACKSON STEEL PRODUCTS, INC.
and SLATER ELECTRIC, INC.,

Defendants-Counter-Claimants-Third-Party Plaintiffs,

Appendix A

DIE MATIC PRODUCTS, INC.,

Defendant-Cross-Claimant,

M.V. BARMED, INC. and JACKSON ACQUISITION CORP.,

Third-Party Plaintiffs,

JOHN J. BERNANSKY ET AL.,

Third-Party Defendants,

AMPEREX ELECTRONIC CO. ET AL.,

Defendants,

ROBERT PASLEY and PASLEY SOLVENTS & CHEMICALS, INC.,

Defendants-Cross-Defendants.

Before:

WALKER, CABRANES, and KATZMANN,

Circuit Judges.

* * *

Appendix A

JOHN M. WALKER, JR., *Circuit Judge*:

This dispute requires us to decide whether the lessee of a 75' X 250' parcel of land in Uniondale, New York, may be held liable as an "owner" for purposes of allocating the costs of remediation imposed by the Environmental Protection Agency ("EPA") under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA").

Defendant Barlo Equipment Corp. ("Barlo") appeals from a judgment of the United States District Court for the Eastern District of New York (Jacob Mishler, *Judge*), finding it liable under CERCLA to plaintiff Commander Oil Corp. ("Commander Oil") as an "owner" of the parcel by virtue of its status as the parcel's lessee/sublessor. Although we conclude that a lessee may, under some circumstances, be held liable under CERCLA as an "owner," we conclude that, under the circumstances of this case, Barlo was not an "owner" within the meaning of CERCLA. Accordingly, we reverse the judgment of the district court in substantial part.[1]

BACKGROUND

In 1963, Commander Oil became the owner of two lots in Nassau County, lots 7A and 7B, after Commander Oil merged with Lawrence J. Bennett, Inc., the lots' record

1. Commander Oil cross-appeals from the judgment of the district court to the extent that it dismissed its claims for indemnification and certain state-law causes of action. In these respects, we affirm the judgment of the district court, as we discuss below.

owner. Lot 7A contained office and warehouse space; 7B, the parcel at issue in this case, housed twelve above-ground petroleum storage tanks and was used by Commander Oil as a fuel depot and "throughput" facility at least until 1967. In 1964, Commander Oil leased the office and warehouse space on lot 7A to Barlo, which was in the business of buying, manufacturing, and distributing petroleum-handling equipment. In 1969, Commander Oil leased lot 7B to Pasley Solvents & Chemicals, Inc. ("Pasley"), which used the site to repackage solvents purchased in bulk and to reclaim and revitalize used solvents. Under Pasley's lease, Commander Oil retained the use of three oil storage tanks on lot 7B.

The arrangement at the heart of the present dispute arose in 1972 when Commander Oil consolidated its leases. Under a single new lease, Commander Oil rented both lots 7A and 7B to Barlo, which in turn subleased 7B to Pasley. This arrangement simplified Commander Oil's bookkeeping and also delegated responsibility to Barlo for basic maintenance and payment of taxes on both lots. The nature of the sublease from Barlo to Pasley is fiercely contested. Barlo characterizes itself simply as a rent conduit and the lease and sublease of 7B as a bookkeeping measure implemented entirely at Commander Oil's behest. Barlo claims that the new arrangement did not change the actual relationship between the three parties and that Pasley continued to treat Commander Oil as its lessor. Commander Oil paints a substantially different picture, referring to instances of Barlo's alleged involvement with Pasley's activities on 7B, and to the fact that Barlo derived a profit, albeit a small one, from the sublease arrangement. We need not resolve this dispute, however, because it does not affect the legal result.

Appendix A

In 1981, an investigation by the Nassau County Department of Health ("DOH") led to the discovery of contamination on lot 7B. The DOH referred the matter to the New York State Department of Environmental Conservation, which charged Pasley in Nassau County District Court with violating the Nassau County Fire Prevention Ordinances. Pasley agreed to drain its tanks, remove solvents it had stored on the lot, and vacate the premises.

Six years later, the EPA ordered Commander Oil to conduct an investigation and a feasibility study to determine the extent of the contamination and to propose a plan for its remediation. In 1988, the EPA sought reimbursement from Commander Oil and other defendants for response costs incurred by the federal government in remediating the site. On January 26, 1996, Commander Oil and other defendants entered into a consent decree in which "Commander agreed to design and implement response actions at the site and to reimburse the United States for past and future response costs incurred in connection with the Site." (Consent Decree ¶ 20). In turn, Commander Oil received contribution for these costs from certain defendants, who ultimately settled for $1,849,127.91.

In 1990, Commander Oil filed this action, demanding contribution or indemnification for additional costs from Barlo and Pasley. Commander Oil's complaint seeks, *inter alia*, indemnification or contribution under CERCLA, contractual indemnification, and damages for various state-law claims including trespass, negligence, nuisance, and waste.

Appendix A

On June 12, 1997, the district court granted partial summary judgment to both Commander Oil and Barlo. For purposes of establishing CERCLA liability, the only contested issue was whether Barlo was an "owner" within the meaning of 42 U.S.C. § 9607(a)(1). The district court held that Barlo was an owner within the meaning of § 9607(a)(1) by virtue of its "authority and control" over lot 7B. In so holding, the district court implicitly rejected Barlo's argument that "owner" in § 9607(a)(1) means "record owner" and instead ruled that "a lessee who has control over and responsibility for the use of the property is the owner of the property" for CERCLA purposes. The district court also denied Commander Oil's claims for contractual indemnification, permitted Barlo to amend its answer in order to plead a statute of limitations defense to Commander Oil's various state-law claims, and, in the same order, dismissed the claims as time barred.

The district court subsequently held a bench trial to apportion liability as between Barlo, Commander Oil, and Pasley. Following trial, the district court ruled that although Pasley was responsible for all response costs, the costs had to be allocated between Commander Oil and Barlo because Pasley was "financially irresponsible." The district court rejected Commander Oil's request for full indemnification from Barlo under CERCLA on the ground that Commander Oil was not an "innocent landowner" within the meaning of 42 U.S.C. § 9607(b)(3). Nevertheless, the district court ruled that Commander Oil could recover 25% of its costs from Barlo under 42 U.S.C. § 9613(f)(1). Accordingly, the district court entered judgment against Barlo in the amount of $802,915 plus 25% of "any future restoration costs."

Barlo appeals from that judgment, arguing that its status as a lessee/sublessor did not make it an "owner" within the meaning of CERCLA and that the district court's apportionment of liability was clearly erroneous. Commander Oil cross-appeals claiming that the district court erred in dismissing its claims for contractual indemnification and in permitting Barlo to amend its pleadings to assert a statute of limitations defense to Commander Oil's state-law causes of action.

DISCUSSION

We are called upon in this case to resolve yet another ambiguity within CERCLA's miasmatic provisions. CERCLA creates a regime of broad-ranging liability, permitting the government to recover its remediation expenses directly from parties responsible for pollution, *see* 42 U.S.C. § 9607(a)(4)(A), and authorizing private parties to pursue contribution or indemnification from potentially responsible parties for expenses incurred responding to environmental threats, *see* 42 U.S.C. § 9607(a)(4)(B). CERCLA creates various categories of potentially responsible parties, one of which is pertinent to this case: owners and operators of facilities. *See* 42 U.S.C. § 9607(a)(1); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (delineating potentially responsible parties as: "past and present owners or operators of facilities, transporters of hazardous substances, and those . . . who generate or arrange for the disposal or treatment of hazardous substances"). Absent a showing that one of CERCLA's affirmative defenses applies, liability for owners and operators is strict. *See B.F. Goodrich*, 958 F.2d at 1198.

Commander Oil's suit against Barlo seeks either contribution or indemnification for the costs it has and will continue to incur under its consent decree with the EPA. The district court granted partial summary judgment to Commander Oil for contribution on the theory that Barlo, as a lessee/sublessor, was an "owner" of lot 7B and was therefore strictly liable.[2] Other courts to have considered whether lessees/sublessors are owners for purposes of CERCLA's strict owner liability provisions have reached the same conclusion on similar facts. *See, e.g., Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 258-59 (S.D.N.Y. 1999) ("[T]he owner of a leasehold of a CERCLA facility may be liable as an owner of that facility."); *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1332-34 (S.D.N.Y. 1992); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1002-03 (D.S.C. 1984), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). Essentially, these courts have interpreted the term "owner" to extend beyond the fee or record owner to anyone possessing the requisite degree of control over the property. Whether, and under what circumstances, a lessee/sublessor may be held liable as an owner for CERCLA purposes is a question of first impression in this circuit and we review the district

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2. As before the district court, the sole contested issue with respect to Barlo's liability under CERCLA is whether Barlo was an owner within the meaning of § 9607(a)(1). There is no dispute that Commander Oil has otherwise satisfied the requirements for establishing a claim under CERCLA. *See Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 163 (2d Cir. 1999) (enumerating the elements of a *prima facie* CERCLA claim).

court's legal conclusions *de novo*. *See Maguire v. Citicorp Retail Servs., Inc.*, 147 F.3d 232, 235 (2d Cir. 1998).

I.

CERCLA's text offers no helpful guidance for interpreting the extent of owner liability. According to the statute: "The term 'owner or operator' means . . . any person owning or operating [a] facility." 42 U.S.C. § 9601(20)(A). We are thus required to give content to a statutory tautology, a position to which we have become increasingly accustomed in the environmental context. Nor are we the first court to have recognized that CERCLA is hardly a model of legislative clarity. *See, e.g.*, *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986); *Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage.").

A.

Our statutory interpretation is guided by CERCLA's few well-established principles. "Because it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties [potentially] responsible for the releases liable for the costs of the cleanup." *B.F. Goodrich*, 958 F.2d at 1198. The scheme envisioned by Congress protects taxpayers generally from bearing the costs of nationwide cleanup. *See id.* Instead, potentially responsible parties must shoulder the frequently

heavy burden of environmental liability. Potentially responsible parties are not limited to parties who were the cause in fact of the contamination, *see New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) ("[S]ection 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation."), but neither does CERCLA automatically assign liability to every party with any connection to a contaminated facility. A recent Supreme Court decision demonstrates the difficulty of determining the limits of CERCLA's strict liability provisions.

In *United States v. Bestfoods*, 524 U.S. 51 (1998), the Court was called on to construe operator liability and decide "whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary." *Id.* at 55. The contested issues in *Bestfoods* concerning corporate law and operator liability do not control the instant dispute. However, the Court faced a similar interpretive task and we find its approach useful here.

We therefore begin our analysis of the term "owner" in § 9607(a) by doing "the best we can to give the term its ordinary or natural meaning." *Bestfoods*, 524 U.S. at 66 (internal quotation marks omitted). But unlike "operator," the term "owner" has no natural meaning that can resolve the present dispute. Barlo urges that CERCLA's owner liability is restricted to record owners. Commander Oil argues for a more expansive definition that relies primarily on the

right to control property, whether the right is possessory or is a recorded property interest. Neither position is obviously implausible. According to Webster's dictionary, an owner is "[O]ne that has the legal or rightful title whether the possessor or not." *Webster's Third New International Dictionary of the English Language Unabridged* 1612 (1981). Black's Law Dictionary, however, equivocates between titular and possessory owner, defining an owner variously as "[o]ne who has the right to possess, use, and convey something," and as "[o]ne who has the primary or residuary title to property." *Black's Law Dictionary* 1130 (7th ed. 1999). This definition's ambiguity comes as no surprise. Long-standing scholarship has informed us that ownership — and its attendant concept "property" — has limited inherent content. *See, e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* 96 (Walter Wheeler Cook ed., 1923) (stating that property "consists of a complex aggregate of rights (or claims), privileges, powers, and immunities").

Courts and commentators have supplied no consistent guidance as to which rights in the proverbial property bundle define ownership. *Compare, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987) (stating that "the right to pass on property — to one's family in particular" constitutes a protected property right under the Fifth Amendment), *with Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding that abrogating the right to sell endangered eagles' feathers did not implicate the Fifth Amendment); *see also* William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581, 1590-94 (1988) (reviewing

various commentators' disagreements over the content of protectable property interests). Our task today is less theoretical yet is still grounded in the same basic controversy over defining ownership. Its manifestation in this case is whether, and under what circumstances, the rights possessed by a lessee are sufficient to rise to the level of "ownership" for CERCLA purposes.

Most of the district courts that have considered this question have held that site control is a sufficient indicator of ownership to impose liability on lessees or sublessors. *See, e.g., Castlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360, 367 (N.D. Cal. 1994); *Burlington N. R.R. Co. v. Woods Indus., Inc.*, 815 F. Supp. 1384, 1391-92 (E.D. Wash. 1993); *Pape v. Great Lakes Chem. Co.*, No. 93 C 1585, 1993 WL 424249, at *3 (N.D. Ill. Oct. 19, 1993); *see also, e.g., Delaney*, 55 F. Supp. 2d at 258-59 ("[T]he owner of a leasehold interest in a CERCLA facility may be liable as an owner of that facility, as long as the lessee exercised sufficient site control to place it in the shoes of owners.") (internal quotation marks omitted); *A & N Cleaners & Launderers, Inc.*, 788 F. Supp. at 1333 ("The undisputed facts establish that [the sublessor] exercised a degree of site control over the Property, that . . . confers ownership status upon it for purposes of CERCLA . . . ."); *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. at 1003 ("[The lessee] maintained control over and responsibility for the use of the property and, essentially, stood in the shoes of the property owners."). The reasoning of these district courts is not without its appeal; if the lessee is the active user and polluter of the property, imposition of CERCLA liability seems particularly appropriate. But, while the imposition of

liability in such a situation is surely correct, imposing *owner* liability instead of *operator* liability threatens to conflate two statutorily distinct categories of potentially responsible parties.

It is settled in this circuit that owner and operator liability should be treated separately. *See, e.g.*, *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996) ("Observing that 'owner' liability and 'operator' liability denote two separate concepts, courts stress the disjunctive character of CERCLA liability." (internal quotation marks omitted)); *cf. Bestfoods*, 524 U.S. at 64 ("If the act rested liability entirely on ownership of a polluting facility, this opinion might end here; but CERCLA liability may turn on operation as well as ownership . . . ."). Even a cursory examination of the basis for operator liability reveals that it would be almost entirely subsumed by owner liability that relied on site control analysis. As the Supreme Court recently explained, "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67. If control over a facility could establish ownership then operator liability in these circumstances would be just a subset of owner liability. Imposing owner liability on the basis of site control threatens to make owners of all operators and surplusage of most of operator liability. *See Castlerock*, 871 F. Supp. at 367 ("The test for 'ownership' liability under CERCLA . . . has become similar to [the] test for 'operator' liability under CERCLA."). Because we strive to avoid redundancy in our interpretation of statutes, *see, e.g.*, *Exxon Corp.*, 475 U.S. at 369-70, we believe that site control alone

is an improper basis for the imposition of owner liability. Lessees may frequently be liable as operators but most lessees are not owners within the meaning of § 9607(a).

B.

While the typical lessee should not be held liable as an owner, there may be circumstances when owner liability for a lessee would be appropriate. Some district courts, for example, have treated lessees as owners for CERCLA purposes when they sublet the premises to other entities. *See, e.g., South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. at 1003 ("The fact that during part of its leasehold [the lessee] sublet a portion of the site does not diminish its responsibility. If anything, it strengthens the case [against the lessee]."). These courts have reasoned that a sublessor, by virtue of its relationship to the sublessee, will often be in the best position — or at least in a better position than the record owner — to prevent pollution at a facility. However, this reasoning improperly emphasizes the relationship between the lessee/sublessor and the sublessee, instead of the relationship between the owner and the lessee/sublessor.

Ownership has consistently defied easy definition across a variety of legal contexts, but we know at least that it is relational. *See Restatement (First) of Property* ch. 1 intro. note (1936) ("[Property comprises] legal relations between persons with respect to a thing."). Ownership exists vis-à-vis someone else; it represents a priority of rights and claims and not a concrete status. Lessees/sublessors necessarily have relationships with both the original lessor — often the record owner — and the sublessee. A lessee/sublessor has many of

the rights and obligations of ownership in relation to the sublessee; he usually retains, *inter alia*, the power to lease, to exclude, and to govern the terms of property's use. But lessees/sublessors are simply lessees in relation to the original owner/lessor, incapable of granting to a sublessee more than they originally acquired from their lessor. Since a typical lessee is not liable as an owner, then logically a sublessor should not be liable either, unless its status with regard to the sublessee operates somehow to confer owner liability. However, we find no basis in CERCLA for supposing that the relationship between the sublessor and sublessee is the critical relationship for identifying owner liability and therefore no principled basis for assuming that a lessee/sublessor's relationship with a sublessee automatically transforms the lessee/sublessor into an owner under § 9607(a). In fact, there are good reasons why this relationship cannot be dispositive for purposes of establishing strict owner liability.

Strict liability is a narrowly tailored tool, capturing a specific kind of responsibility. CERCLA's admittedly disjointed legislative history offers some useful insights into the congressional purposes motivating strict owner liability. *Cf. Shore Realty Corp.*, 759 F.2d at 1039 (stating that "CERCLA's history reveals as much about the nature of the legislative process as about the nature of the legislation," but nevertheless finding important guidance from the Act's history). The report of the Senate Committee on Environment and Public Works justified CERCLA's imposition of strict liability in part by referring to the English case of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). *See, e.g.*, S. Rep. No. 96-848, at 33 (1980), *reprinted in* 1 *Legislative History of*

the Comprehensive Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510, at 305, 340 (1983) [hereinafter "*CERCLA Legislative History*"]. The reference is instructive. The principle enunciated in *Rylands v. Fletcher* has been succinctly stated by this court in *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978): "When one enters into a business or activity for his own benefit, and that benefit results in harm to others, the party should bear the responsibility for that harm." Central to the *Rylands v. Fletcher* theory of strict liability is the underlying fairness of imposing on the beneficiaries of an ultra-hazardous activity the ultimate costs of that activity. The Senate Committee wrote: "To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity." 1 *CERCLA Legislative History*, *supra* at 320. CERCLA's strict owner liability, therefore, can be justified in part on the grounds that owners — even as lessors — derive benefit from the activities conducted on their property.

The same justification for strict liability does not necessarily or automatically apply to lessees/sublessors, as the facts of the present case make clear. The arrangement that led to Pasley's contamination of the site was between Commander Oil and Pasley, not between Pasley and Barlo. The terms of the original lease between Pasley and Commander Oil were set before Barlo was interposed as a sublessor. Commander was a sophisticated lessor and fully capable of including in the price of the lease the risk of Pasley

contaminating the site. As we explain in part II of this opinion, *infra*, owner liability might attach to a sophisticated lessee/sublessor who exploits unanticipated risks on the property of an unsophisticated owner. But here, and in the normal course of events, such liability will not attach to lessees/sublessors.

There is an additional policy reason supporting our conclusion that owner liability should not automatically apply to lessees/sublessors. When buyers are considering purchasing property they will usually conduct an environmental assessment prior to closing. CERCLA has raised the costs of owning polluted land, and owners and potential owners are on notice of their liability and are wise to ensure that a potential acquisition is not encumbered by massive environmental liability. So far as we are able to discern, the same is not true of lessees/sublessors. A lessee/sublessor's concern about environmental hazards on a site will usually be limited to ensuring "that the property is adequate for the tenant's purposes and that there are no on-site environmental conditions or features which would impair the tenant's ability to operate." Richard D. Jones & Ivan S. DeVoren, *Managing Environmental Risks in Commercial Real Estate Leases*, SA81 ALI-ABA 121, 126 (1996). We are reluctant to surprise Barlo with new and unexpected liability, and to undermine the security of lessees/sublessors throughout the circuit who have entered into subleases before this decision.

Appendix A

II.

We do not foreclose the possibility that in some circumstances lessees/sublessors may be liable as owners under CERCLA. Certain lessees may have the requisite indicia of ownership vis-à-vis the record owner to be *de facto* owners and therefore strictly liable. Such would probably be true of a lessee with the proverbial 99-year lease. While we need not define with specificity those factors that might transform a lessee into an owner, we note several that we think could be important, specifically: (1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms; (3) whether the lessee has the right to sublet all or some of the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs. This non-exclusive list is meant to reinforce the point that the critical question is whether the lessee's status is that of a *de facto* owner and not whether it exercises control over the facility. *Cf. Bedford Affiliates v. Sills*, 156 F.3d 416, 425 (2d Cir. 1998) (noting that the innocent owner exception to liability is premised on an entity's status and not on its participation in activities relating to contamination). Moreover, the critical relationship is that between the lessee/sublessor and the owner/lessor, not that between the lessee/sublessor and the sublessee.

For example, sale-leaseback arrangements may not serve to insulate the former-owner/lessee from owner liability if

the lessee actually retains most rights of ownership with respect to the new record owner. *See* 2 *Powell on Real Property* § 17A, at 3 (1997) ("[T]he tenant's position as to use and occupancy and responsibility for operating expenses does not differ, from a practical standpoint, from the position that the tenant occupied as owner prior to sale."). Likewise, extremely long-term leases may create owner liability in the lessee if, according to the terms of the lease, the lessee retains so many of the indicia of ownership that he is the *de facto* owner. And owner liability might also lie where a lessee/sublessor has impermissibly exploited — by use himself or through a sublease — more rights than he originally leased, effectively expropriating from the owner the right to benefit from activity on the property.

Applying these principles to the case at hand, we conclude that the district court erred in holding Barlo strictly liable as an owner pursuant to 42 U.S.C. § 9607(a)(1). Whether or not Barlo was simply a rent conduit between Commander Oil and Pasley — as Barlo claims — it did not possess sufficient attributes of ownership over lot 7B. By the terms of the lease between Barlo and Commander Oil, Barlo was, *inter alia*, (1) limited to using lot 7A, and only "for that business presently conducted by tenant on a portion of the same premises leased hereunder"; (2) required to obtain written consent from Commander Oil before making "any additions, alterations or improvements" on the land, which alterations would become Commander Oil's property in any event; (3) required to obtain written approval from Commander Oil to sublet the property, and prohibited from subletting to any entity that had "any connection with the fuel, fuel oil or oil business"; (4) required to obtain written

permission from Commander Oil to display any "sign, advertisement, notice or other lettering" on the building; (5) required to keep the property "clean and in order to the satisfaction of" Commander Oil, and responsible for any damage Barlo itself caused to the premises or to the "systems or equipment or any installation therein"; and (6) prohibited from doing anything that would "in any way increase the rate of fire insurance" on the property, and from bringing or keeping upon the premises "any inflammable, combustible or explosive fluid, chemical or substance." In addition, the lease was limited to a five-year term with one option for renewal.

Moreover, Commander Oil retained many of the rights and obligations of ownership. Among other things, the fuel company: (1) reserved a right to enter onto the lot for various purposes; (2) reserved for its own use three oil storage tanks on lot 7B; (3) reserved an "option" to use, on written notice to Barlo, "certain office space" within lot 7A; (4) reserved the right to maintain "its aerial or a comparable aerial" on the roof of the building; and (6) assumed responsibility to make structural repairs.

To be sure, Barlo possessed some attributes of ownership with respect to lot 7B. For instance, Barlo was obligated to secure insurance for the property, was liable to Commander Oil for all assessments on the property and any increases (but only increases) in taxes, and assumed responsibility for all nonstructural repairs, including "all repairs to heating, plumbing and lighting fixtures and equipment; cesspool maintenance, repair and replacement; snow removal; driveway, parking area and pavement repairs, etc."

Notwithstanding these attributes, however, Barlo lacked most of the bundle of rights that comes with ownership of property. Accordingly, it may not be held liable under CERCLA as an owner, and the judgment of the district court is reversed to the extent that it imposed liability against Barlo for the contamination on lot 7B.[3]

III.

Commander Oil has cross-appealed on two grounds: that the district court erred by refusing to grant Commander Oil indemnification as opposed to contribution; and by permitting Barlo to amend its answer to plead a statute of limitations defense to Commander Oil's state-law claims. We disagree.

Commander Oil argues first that it should be entitled to indemnification pursuant to 42 U.S.C. § 9607(a)(4)(B). However, we have previously held that potentially

3. Commander Oil urges us, if we disapprove of the district court's judgment, to remand the case for further proceedings to determine whether Barlo might be liable as an operator. We decline to do so. Although there are some unresolved factual issues that would bear on whether Barlo was an operator within the meaning of 42 U.S.C. § 9607(a)(1), under no version of those facts could Barlo be said to have "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67. Moreover, in light of our conclusion that Barlo is not liable as an owner under CERCLA, we need not — and do not — reach its arguments on appeal concerning the district court's apportionment of liability.

responsible parties may pursue only contribution claims against other potentially responsible parties and may not seek indemnification. *See Bedford Affiliates*, 156 F.3d at 423-24. In an effort to circumvent the rule of *Bedford Affiliates*, Commander Oil argues, contrary to the district court, that it was entitled to an "innocent owner" defense and thus was not a potentially responsible party. We express no view as to whether a successful innocent owner defense negates potentially responsible party status because it was not clearly erroneous for the district court to determine that Commander Oil was not innocent within the meaning of the statute. Certain semi-volatile organic compounds consistent with pollution from petroleum were found at the site under the tanks retained by Commander Oil and at least some testimony was presented at trial describing an oil spill from one of Commander Oil's trucks. Commander Oil is therefore a potentially responsible party and thus not entitled to pursue an indemnification claim.

Alternatively, Commander Oil argues that it is entitled to contractual indemnification from Barlo by virtue of their lease agreement. Commander Oil relies on those portions of the standard contract that require Barlo to prevent and abate nuisances connected with the property, and to repair the property. However, Commander Oil failed to raise the issue below in a timely manner and it is therefore waived for purposes of this appeal. In any event, indemnification provisions in contracts are to be strictly construed, *see, e.g.*, *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 51 (2d Cir. 1993) (citing New York law), and we doubt whether Commander Oil and Barlo's generic lease agreement could have shifted to Barlo the kind of massive CERCLA liability at stake in this case.

Finally, so long as leave was properly given to Barlo to amend its answer, Commander Oil's remaining claims for negligence, nuisance, trespass, and waste were properly dismissed as time barred. Leave to amend shall be freely given, and this court reviews the district court's actions for abuse of discretion. *See Block v. First Blood Assoc.*, 988 F.2d 344, 350 (2d Cir. 1993). Parties are generally allowed to amend their pleadings absent bad faith or prejudice. *See State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981). Moreover, "it is rare for an appellate court to disturb a district court's discretionary decision to allow amendment." *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 235 (2d Cir. 1995). Commander Oil's claimed prejudice derives from the expenses incurred preparing to litigate its state-law claims. However, we see no reason to believe — and Commander Oil has not demonstrated — that these costs were in any way additional to the costs it necessarily incurred preparing its CERCLA claims. Even in the face of Barlo's seven-year delay to add its statute of limitations defense, we will not upset the district court's decision to permit Barlo to amend its answer accordingly, absent any showing of prejudice to Commander Oil or bad faith on the part of Barlo.

CONCLUSION

For the reasons stated above, the judgment of the district court is REVERSED to the extent that it imposes CERCLA liability against Barlo. The judgment of the district court is AFFIRMED to the extent that it dismisses Commander Oil's indemnification and state-law claims.

APPENDIX B — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JULY 6, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

90-CV-1243

COMMANDER OIL CORPORATION,

Plaintiff,

– against –

BARLO EQUIPMENT CORP., et al.

Defendants.

Memorandum of Decision and Order

July 6, 1998

* * *

MISHLER, D.J.,

Through an Order to Show Cause filed on June 5, 1998, Barlo Equipment Corp. (the "Defendant") has moved this court pursuant to Fed.R.Civ.P. 59(e), 60(b), 52(a), 52(b) and 59(a), respectively, to alter and amend the court's Judgment, dated May 20, 1998 (entered on May 26, 1998 and amended on June 1, 1998), to grant relief from the court's findings, to

have the court amend its findings, to have the court make new findings or to have the court order a new trial. The court denies Defendant's requests for the reason stated below.

The Federal Rules of Civil Procedure at issue state the following. Rule 59(e) simply sets a time limit of 10 days within which to move to alter or amend judgment and does not provide for relief. Secondly, Rule 60(b) states, in pertinent part:

> On motion and upon such terms that are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Thirdly, Rule 52(a) grants authority to the court both to find facts and state conclusions of law, and Rule 52(b) allows a party to move for an amendment of those findings. Finally, Rule 59(a) provides that:

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> A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Defendant's claims fail to satisfy the requirements of any of these rules. Defendant's brief contends that the court erred in several ways: by finding the Defendant liable for 25% of response costs; by apportioning a share of Pasley's 100% liability to the Defendant; by concluding that Commander Oil Corporation (the "Plaintiff") had met its burden of proof with regard to Pasley's share of liability as an "orphan share"; and by holding that the Defendant was liable in the absence of a showing that the Defendant knew or should have known that Pasley was polluting the property.

The court has considered carefully each of these issues, along with others, prior to, at and after the December 1997 bench trial and has given the parties a full and fair opportunity at various points throughout the matter to argue and/or brief these issues in accordance with a time schedule set by the parties. Thus, there is no basis for Defendant to request reconsideration in the form of a motion for a new trial or a motion for altering or amending current findings or making

new findings under the above federal rules. Moreover, the Defendant's reference to *U.S. v. Bestfoods* as a means for introducing new grounds is misplaced: that case concerned the question of liability in the parent-subsidiary context whereas the instant case concerns the question of liability in the landlord-tenant and owner-operator context.

ORDER

The Defendant's motion is denied, and execution is stayed for ten (10) days from date.

s/ Jacob Mishler
JACOB MISHLER, U.S.D.J.

APPENDIX C — MEMORANDUM OF DECISION AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MAY 20, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 90-1243

COMMANDER OIL CORP.,

Plaintiff,

– against –

BARLO EQUIPMENT CORP., ROBERT PASLEY, PASLEY SOLVENTS & CHEMICALS, INC., CONSOLIDATED LITHO COMPANY, F&R DISPLAY FIXTURES, JACKSON STEEL PRODUCTS, INC., TRANS WORLD OPTICS, INC., and ULTRA SPRAY,

Defendants.

Memorandum of Decision and Order

May 20, 1998

* * *

MISHLER, District Judge

The court conducted a trial on the following issues which were identified in the court's memorandum of decision dated

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June 10, 1997, as relevant to the claim of Commander Oil Corporation ("Commander") against Barlo Equipment Corp. ("Barlo"):

1. Whether Commander is an "innocent owner" and entitled to recover response costs against Barlo pursuant to § 107 of CERCLA, 42 U.S.C. § 9607, for joint and several liability.

2. Apportioning Liability — the degree to which Commander's response costs should be imposed on Barlo.

3. The nature and extent of Commander's response costs and damages including the percentage of salary of Commander's employee charged as a response cost.

4. The deposit of $1.6 million representing the proceeds of Commander's insurance policy into the Remedial Trust Fund, claimed by Barlo as reducing its damages.

Innocent Landowner Exception

Commander claims its right to total response costs against Barlo pursuant to § 9607(a) as an innocent landowner, citing *Rumphe of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235 (7th Cir. 1997). *Rumphe* is discussed at length in the court's memorandum of decision (pp. 46-50) dated June 10, 1997 (hereinafter "MOD"). The fact findings in the MOD deny Commander the status of "innocent landowner."

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Pasley was a tenant of Commander from 1969 to February 1, 1973. Barlo leased the office and warehouse space adjacent to the Site to engage in the business of buying, selling and manufacturing petroleum-handling equipment. In 1972 Commander entered into a lease with Barlo which provided for the continued occupancy and use by Pasley on part of the Site. Pasley used its portion of the premises as a chemical distribution center. Chemicals reclaimed from Pasley customers were stored at the Site in 55 gallon drums. While stored at the portion of the Site used by Pasley, hazardous substances were released in the soil and polluted the ground water at the Site.

Commander was aware of Pasley's use of the Site and Pasley's release of hazardous substances into the soil. Commander continued to receive rent for Pasley's use after 1972, until June 1982, through Barlo. Commander was aware of Pasley's use of the Site during Pasley's occupancy.

Under § 9607(b) the burden of proof is on Commander to "establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —

* * *

(3) an act or omission of a third party . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . .

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The MOD (pp. 4-5 & 6) describes Commander's use of the Site from about 1961 to 1967 as a fuel oil depot. Under the Barlo lease, Commander retained control of three (3) oil storage tanks and the pump house and loading platform. The Site in the area of the oil storage tanks and pump house were polluted by hydrocarbons present in fuel oil known as semi-volatile organic compounds ("SVOCs"). The presence of SVOCs at the area of the Site used by Commander is attributable to Commander. Commander's pollution of the soil was minimal compared to Pasley's.

Commander failed to sustain its burden of proving that it was an innocent landowner.

Apportioning Response Costs

Section 9613(f)(1) states in pertinent part:

> [I]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable facts as the court determines are appropriate.

The court in *United States v. Colorado & Eastern R. Co.*, 50 F.3d 1530, 1536 (including f.n.5) (10th Cir. 1995) discusses § 9613(f) as follows:

> To resolve contribution claims, § 113(f)(1) continues, "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). In any given case, "a court

may consider several factors, a few factors, or only one determining factor, . . . depending on the totality of the circumstances presented to the court." *Environmental Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992).[5] Of course, the burden of proof is on the . . . party seeking apportionment to establish that it should be granted." H.R.Rep. No. 99-253 (III). 99th Cong. 1st Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3038, 3042; *see United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507-08 (6th Cir. 1999) (a party is entitled to relief against the other defendant to the extent that it can "demonstrate the divisibility of the harm and that it paid more than its fair share"), *cert. denied*, 494 U.S. 1057, 110 S. Ct. 1527, 109 L.Ed.2d 767 (1990).

5. In addition, many courts look to the "Gore Factors", proposed in a moderate approach to joint and several liability by Senator Albert Gore, to apportion contribution claims under § 113(f)(1). We emphasize that the Gore Factors are neither an exhaustive nor exclusive list. The six factors are: (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (ii) the amount of the hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste

> concerned, taking into account the characteristics or such hazardous waste; and (vi) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or the environment. *Environmental Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508-09 (7th Cir. 1992).

Pasley is responsible for all the response costs. We are advised that Pasley is financially irresponsible.

Barlo was aware of Pasley's use of the premises. It had the authority under the sublease with Pasley to halt the spillage of hazardous substances into the soil. Pasley was obliged under CERCLA to exercise its authority.

In considering all the circumstances upon which apportionment is based, the most significant are: (1) Commander will benefit in remedying the condition of the Site, and (2) Commander polluted the soil as described above.

We find that the sum now due to the Remedial Trust Fund as hereinafter computed should be apportioned between the parties as follows:

Commander Oil Corp. — 75%

Barlo Equipment Corp. — 25%

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The Nature and Extent of Response Cost

Section 9607(a)(4)(B) provides for the recovery of "any . . . necessary costs of response incurred . . ." The court in *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991), discussing costs incurred and response costs expended in the future holds:

> Under CERCLA's scheme for private action, response costs may not be recovered when there has been no commitment of resources for meeting these costs. Section 9607(a)(4)(B) permits an action for response costs "incurred — not "to be incurred." Moreover, CERCLA expressly provides for declaratory actions for determining liability as to future response costs. Section 9613(g)(2) provides that in actions under § 9607, "the court shall enter a declaratory judgment on liability for response costs . . . that will be binding on any subsequent action or actions to recover further response costs. . . ."

Commander claims response costs totaling $6,222,168.37 consisting of:

(1) $3,500,000.00 — Remedial Trust Fund set up by Commander to guaranty performance of the remedy.

(2) $1,802,231.37 — Uncontested past response costs.

(3) $ 361,762.00 — Contested past response costs.

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(4) $ 350,000.00 — Future EPA oversight costs.

(5) $ 163,175.00 — Indirect response costs (personnel and overhead expenditures).

(6) $ 45,000.00 — Interest on future payment of EPA's past response costs.

Barlo challenges Commander's right to assess response costs for the following items (referring to the above numbering):

(2) Uncontested past response costs. Barlo does not claim that the costs were not response costs. Barlo claims it does not become an assessable response cost until it is paid. We hold that Commander's obligation to pay for services rendered in the clean-up are response costs and assessable against Barlo.

(3) Contested past response costs. Barlo challenges the services of Edgar Barnett, an employee of Commander, as a restoration cost in the amount of $163,175.00. The record supports the charge. Services were rendered toward the clean-up. Had Commander used the services of a non-employee it would be chargeable. The services rendered by Barnett in aiding the remedial process is a restoration cost.

Barlo also challenges the sum of $80,000.00 paid to Levine & Robinson, as attorneys for Camin Cargo on the ground that "there is insufficient evidence to establish that

these items are recoverable response costs." (Barlo's memo, pp. 54-55). The objection is overruled. (Tr. pp. 310-313 — Barnett's testimony).

Barlo challenges the payment of $23,700.00 to Metcalf & Eddy for "Additional work in connection with the feasibility study and remedial investigation." Metcalf & Eddy were retained for work on the remedial investigation and feasibility study of the Site. The court found, based on the testimony of Keith Tyan, that Metcalf & Eddy services were rendered in 1992 (Tr. p. 320), Ryan testimony (pp. 174-175, 202, 206-207. *See* Barnett's testimony p. 319: "It (Ex. 140) shows that $23,700.00 was paid to Metcalf & Eddy on April 30, 1992, and it would have been only in conjunction with the Pasley Site."

Barlo objects to the charge of $3,000.00 paid to Marcum & Kleigman based on Barnett's testimony "that the amount only related to the preparation of a letter for Commander regarding the trust fund." (Barlo memo, pp. 55-56). Barnett testified that the services rendered by Marcum & Kleigman, E.P.A., were much more and related to the plan to remedy the Site. (Tr. pp. 320-321).

Commander seeks recovery of the full amount of the Remedial Trust Fund in the amount of $3.5 million, required under the Consent Decree. Commander is obligated to pay Trea-Tek to conduct remediation of the Site the sum of $2,338,622.00. To the extent that Commander seeks a sum in excess to which it is obligated, the court finds that the sum of $2,338,622.00 paid or payable to Trea-Tek is recoverable. We deny the excess sum of $1,161,378.00 as a

cost of restoration. We find restoration costs to be $5,060,790.37 (reducing the sum claimed by $1,161,378.00). Crediting the sum due with payments made by the settling defendants in the amount of $1,849,127.71, the fund is now owed the sum of $3,211,662.66.

Barlo seeks credit for the proceeds of an insurance policy issued to Commander in the amount of $1.6 million. We are guided by the collateral service rule denying the benefit received by Commander based on its payment of insurance premiums, to inure to Barlo.

Judgment is awarded Commander Oil Corp. against the Defendant Barlo Equipment Corp. in the sum of $802,915.00.

The court grants declaratory judgment providing for the payment of any future restoration costs which have not been considered in this memorandum of decision. Barlo is liable for 25% of such costs.

SO ORDERED.

A judgment is issued simultaneously herewith.

s/ Jacob Mishler
JACOB MISHLER,
U.S. District Judge

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 90-1243

COMMANDER OIL CORP.,

Plaintiff,

– against –

BARLO EQUIPMENT CORP., ROBERT PASLEY, PASLEY SOLVENTS & CHEMICALS, INC., CONSOLIDATED LITHO COMPANY, F&R DISPLAY FIXTURES, JACKSON STEEL PRODUCTS, INC., TRANS WORLD OPTICS, INC., and ULTRA SPRAY,

Defendants.

JUDGMENT

The action having come on for trial before Honorable Jacob Mishler, District Judge presiding, and the issue of liability having been tried and a decision rendered on June 10, 1997, and the issue of damages against defendants Barlo Equipment Corp., Robert Pasley and Pasley Solvents & Chemicals, Inc. having subsequently been tried and a decision rendered,

It is ORDERED and ADJUDGED

that plaintiff Commander Oil Corp. recover of defendants Robert Pasley and Pasley Solvents and

Chemicals, Inc. ("Pasley") the sum of $3,211,662.00, and it is further

ORDERED and ADJUDGED

that plaintiff Commander Oil Corp. recover of defendant Barlo Equipment Corp. the sum of $802,915.00, and that Barlo Equipment Corp. have a right of indemnity against Pasley for any sums paid pursuant to this judgment, and it is further

ORDERED and ADJUDGED

that defendants shall pay any restoration costs, not considered by the court in its memorandum of decision. Pasley shall pay the full amount of such costs. Barlo Equipment Corp. shall pay 25% of such costs.

The claims against Consolidated Litho Company, F&R Display Fixtures, Jackson Steel Products, Inc., Trans World Optics, Inc. and Ultra Spray are dismissed.

Commander Oil Corp. shall recover costs of the action.

Dated: Uniondale, NY
May 20, 1998

s/ Jacob Mishler
JACOB MISHLER,
U.S. District Judge

APPENDIX D — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JUNE 10, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 90-1243

COMMANDER OIL CORP.,

Plaintiff,

– against –

BARLO EQUIPMENT CORP., ROBERT PASLEY, PASLEY SOLVENTS & CHEMICALS, INC., CONSOLIDATED LITHO COMPANY, F&R DISPLAY FIXTURES, JACKSON STEEL PRODUCTS, INC., TRANS WORLD OPTICS, INC., and ULTRA SPRAY,

Defendants.

Memorandum of Decision and Order

June 10, 1997

* * *

MISHLER, District Judge:

Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980

("CERCLA"), 42 U.S.C. § 9601 *et. seq.*, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et. seq.*, the Real Property Actions and Proceeding Law of the State of New York ("RPAPL"), the Environmental Conservation Law of the State of New York ("ECL"), and New York State's common law of nuisance, negligence, trespass and abnormally dangerous activity, Plaintiff Commander Oil Corporation ("Commander") seeks recovery of and contribution for its past and future costs resulting from the release of hazardous wastes on a parcel of real property owned by Commander and identified on the Nassau County Land and Tax map as Lot 7B in Block D of Section 44, at Commercial Avenue in Uniondale, Nassau County (the "Site") from defendants Barlo Equipment Corp. ("Barlo"), Consolidated Litho Company ("Consolidated"), F&R Display Fixtures ("F&R"), Jackson Steel Products, Inc. ("Jackson Steel"), Pasely Solvents & Chemicals Inc. ("Pasely"), Robert Pasely, the President of Pasely, Trans World Optics ("Trans World"), and Ultra Spray (collectively referred to as the "Defendants").

I. *The Motions*

Presently before the Court is Commander's motion for partial summary judgment pursuant to Fed. R. Civ. P. 56, in which it seeks an order from the Court:

a. imposing liability upon Barlo as an "owner or operator" pursuant to 42 U.S.C. §9607(a)(2);

b. imposing liability upon both Pasely and Robert Pasely, as "operators," and

"transporters" of hazardous materials pursuant to 42 U.S.C. §§ 9607(a)(2) and 9607(a)(4), respectively;

c. imposing liability upon Consolidated, F&R, Trans World, and Ultra Spray as "arrangers" for the transport of hazardous substances, pursuant to 42 U.S.C. § 9607(a)(3);

d. holding each of the Defendants jointly and severally liable for recovery of past and future response costs and other damages incurred by Commander in connection with the cleanup, pursuant to 42 U.S.C. § 9607(a);

e. holding each of the Defendants liable to Commander for contribution for its past and future response costs and other damages incurred by Commander in connection with the cleanup, and allocating said costs among each Defendant pursuant to 42 U.S.C. § 9613(f);

f. holding each of the Defendants responsible for all future response actions necessary to carry out the remedies elected in the Record of Decision and Amended Record of Decision pursuant to RCRA, 42 U.S.C. § 6973(a); and

g. imposing liability upon each of the Defendants for violations of New York's ECL §§ 27-0911 and 27-0913 and New York's common laws

of public nuisance, trespass, negligence, waste and strict liability for conducting abnormally dangerous activity.

Defendant Barlo cross-moves for an order granting summary judgment, dismissing the claims against it, and moves to amend its answer to assert the affirmative defense of statute of limitations. Defendant Consolidated opposes Commander's motion for partial summary judgment, based upon a lack of competent evidence. On May 29, 1997, the Court heard oral argument on the various motions.

II. *Background*

In 1963, Commander became the owner of the Site through a merger with the owner of record at that time, Lawrence J. Bennet, Inc. ("Bennet"), formerly known as L.E.K. Valentine, Inc. Bennet and Commander were both in the business of dealing in fuels and fuel products, including oil and gasoline, and each conducted retail and wholesale business operations from the Site. From about 1961 to at least 1967, Commander operated the Site as a fuel oil depot.[1]

The Site is described as a 75 by 250 foot parcel which, prior to dismantling in 1988, contained 12 above-ground storage tanks; three 75,000 gallon vertical tanks, six 10,000 gallon horizontal tanks, two 15,000 gallon tanks and one

1. Title to the Site (and Lot 7A) was conveyed to L.E.K. Valentine, Inc. on December 3, 1963. In 1970, L.E.K. Valentine, Inc. changed its corporate name to Lawrence J. Bennet, Inc. Commander merged with Lawrence J. Bennet, Inc. on January 3, 1979.

5,000 gallon horizontal tank. (Compl. ¶ 25.) Commander is also the owner of the adjacent property on Commercial Avenue, Lot 7A, which contains office and warehouse space.

A. *Barlo's Interest in the Site*

The following facts are not in dispute:

Barlo began leasing Lot 7A, the office and warehouse space adjacent to the Site, on April 1, 1964 (the "Barlo Lease") from Bennet. The premises were to be used and occupied by Barlo for the purpose of buying, selling, manufacturing, jobbing and distributing petroleum-handling equipment. Barlo continued to lease the office space from Commander after Commander's merger with Bennet, and in 1972 Commander and Barlo extended the Barlo Lease for an additional five (5) years upon the same terms and conditions. However, the 1972 Barlo Lease placed Barlo in possession of both the office space and the Site, and provided that Barlo would sublet the Site to Pasley, a chemical distribution company, and previously Commander's tenant at the Site. (Tr. at 36.)[2] The Barlo Lease was maintained until 1989.

Under the terms of the Barlo Lease, Barlo enjoyed the rights and bore obligations of ownership over the entire Site, other than "that portion of the subject premises which contains three (3) oil storage tanks located at the southerly portion of the property, and the pump house and loading

2. References to "Tr." are to the transcript of oral argument held on May 29, 1997.

platform adjacent thereto," over which Commander retained control. (Barlo Lease at ¶ 2.) The Barlo Lease obligated Barlo to (1) pay charges for all utilities and services (Barlo Lease ¶ 30); (2) maintain public liability insurance over the premises (Barlo Lease ¶ 31); (3) pay "any increases in real estate taxes over and above the amounts paid by the landlord during the calendar year 1972," (Barlo Lease ¶ 28), and (4) make all repairs to the premises except structural repairs, i.e., "all repairs to heating, plumbing and lighting fixtures and equipment; cesspool maintenance repair and replacement; snow removal; driveway; parking area and pavement repairs, etc." (Barlo Lease ¶ 3.)

With respect to Pasely, the Barlo Lease provided:

> 25th. Tenant is presently in possession of a portion of the premises and as of the date of the commencement of this lease, certifies that he has possession of the entire premises. The landlord and tenant acknowledges that at the present time there is another tenant occupying a portion of said premises, to wit, PASLEY SOLVENTS & CHEMICAL, INC., a Corporation occupying a portion of said premises without an existing lease. The tenant occupies the premises subject to the tenancy mentioned herein, and the landlord grants to the tenant the right to negotiate a sub-lease with the aforementioned sub-tenant, or any other sub-tenant to the sub-leasing provisions of this instrument.

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B. *Pasley's Use of the Site*

As indicated above, Pasely had been in possession of the Site, as a tenant of Commander, beginning in 1969. (Tr. at 36.) On February 1, 1973, Pasely became the sub-tenant of Barlo, enabling Commander to receive one rent check from Barlo for the entire lot, rather one from Barlo for the office space and another from Pasely for the Site. (Tr. at 36-38.) Barlo and Pasley executed a sublease of the tank farm at the Site (the "Pasely Sublease") "for the unexpired term of five (5) years to commence the 1st day of February 1973 and to end on the 30th day of September 1977." The Pasley Sublease authorized the use of the premises for "that business presently conducted by the tenant on a portion of the same premises leased hereunder."[3]

The Pasley Sublease incorporated provisions of the Barlo Lease relating to the right of Pasley to assign or sublet the premises, other than the portion of the premises used by Commander which contained "three (3) oil storage tanks." It also provided that Pasley pay "that percentage of the tax increase over the year 1972, that the square footage occupied by him bears to the total square footage of the landlord's premises." (Pasely Sublease at ¶ 34.) The Pasely Sublease created a landlord-tenant relationship between Barlo and Pasely. Indeed, at his deposition, Robert Pasely indicated that after he signed the Pasely Sublease, he looked to Barlo as his landlord. (Robert Pasely Dep. at 69.) As landlord, Barlo was obliged "to commence alterations necessary to provide

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3. We note that Barlo claims that prior to the execution of the Pasely Sublease, Pasley was using the Site "as a chemical distribution facility." (Barlo's Mem. Opp. at 3-5.)

the tenant with exclusive use and occupancy of the yard. . . ." (Pasely Sublease ¶ 38.) Pasely, as a tenant, maintained "the right to terminate the sub-lease if . . . the use of the demised premises be deemed illegal by any act, regulation or law of any governmental body. . . ." (Pasely Sublease ¶ 40.)

From at least February 1, 1973, the date of execution of the Pasley Sublease, to June 1982, Pasely used the Site as a chemical distribution center. Pasely would purchase bulk virgin solvents from major corporations such as Exxon and Shell, and would transfer them into its bulk tanks located at the Site, then repackage the solvents into 55-gallon drums for shipment to its customers in New York and New Jersey.

The Site was also used to store, transfer and dispose of that portion of Pasely's customer's solvents which were economically feasible to reclaim. The customer would place the reclaimable solvents back in the 55-gallon drums, and then call Pasely to pick up the drums for transport to the Site. The drums were stored at the Site in a berm concrete storage area until shipment to a reclaimer for revitalization and potential resale. The berm concrete storage area was built by Pasely with the permission of Barlo. The drums generally remained on the Site for three to four weeks. (See Robert Pasely's Dep. at 72.) While stored at the Site, either for reclamation or final disposal, hazardous substances were released in the soil and ground water at the Site.

C. *Notice of Contamination at the Site*

On June 8, 1981, an investigation by the Nassau County Department of Health ("NCDOH") revealed that the soils at

the Site were contaminated with hazardous materials (See Administrative Order, dated April 18, 1988, ¶ 16, annexed at Ex. 6 to Commander's Rule 3(g) Stmt., the "Administrative Order.") By letter dated June 29, 1981, the NCDOH advised Pasley that the Site was inspected on June 8, 1981, and that soil samples from the areas beneath the storage tanks contained high levels of halogenated and non-halogenated solvents, making it appear "that the soil has been contaminated with chemicals your facility processes." Pasley was ordered to commence a cleanup action at the Site (Administrative Order ¶ 17.) Pasley discontinued its chemical distribution operation from the Site in May 1982. (Administrative Order ¶ 20.)

NCDOH referred the matter to New York State Department of Environmental Conservation ("DEC"). Pasley was charged with violations of the Nassau County Fire Prevention Ordinances in the Nassau County District Court. On April 14, 1982, Pasley agreed to drain all tanks, remove all product storage from the premises and vacate the premises. Pasley vacated the premises in June 1982.

On August 19, 1988, an Administrative Order relating to the Site was issued by the United States Environmental Protection Agency (the "EPA") on consent of Commander, pursuant to CERCLA § 104(a) and (b) and § 122(d)(3). It referred to the Site as the "Pasely Solvent and Chemicals Site." As "owner and/or operator" of the Site at the time of the Administrative Order "and/or at the time of the disposal of the hazardous substances," Commander was ordered to undertake a Remedial Investigation and Feasibility Study with respect to the Site." (Administrative Order ¶ 33.)

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On November 2, 1995, the United States, on behalf of the Administrator of the EPA, filed a complaint against Commander and certain other defendants pursuant to CERCLA §§ 106(a) and 107(a), seeking reimbursement for costs incurred by the EPA and Department of Justice for response actions at the Site and seeking to compel performance of studies and future response actions by Commander at the Site. On January 26, 1996, a consent decree (the "Consent Decree") was entered into among Commander and certain settling defendants, pursuant to which "Commander agreed to design and implement response actions at the site and to reimburse the United States for past and future response costs incurred in connection with the Site." (Consent Decree ¶ 20.) Commander received contributions from the settling defendants in the amount of $1,849,127.91 as part of the cost of the remedial work undertaken by Commander in accordance with the Consent Decree. It presently seeks contribution from the non-settling defendants named as Defendants herein.

III. *Commander's CERCLA Claims*

Commander moves for partial summary judgment on the issue of the Defendants' CERCLA liability. Fed. R. Civ. P. 56(c) provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

> of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). *See Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996).

The moving party has the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970). *See Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986). Once the moving party satisfies "the initial burden of demonstrating that no genuine issue of facts exists . . . the non-moving party must set forth specific facts demonstrating that there is a genuine issue for trial." *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960, 962 (D. Conn. 1991) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S. Ct. at 2511), *aff'd*, 958 F.2d 1192 (2d Cir. 1992). In meeting its burden, the non-moving party may not rest upon speculation, conjecture or conclusory allegations. *See Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1996). If, after considering the record, a jury could draw a reasonable inference in favor of the non-moving party on a material fact, summary judgment must be denied. *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988).

Commander's first set of claims for remedial costs and other damages are based on CERCLA, 42 U.S.C. § 9607,

which imposes liability on several classes of individuals, including generators of hazardous waste, present or past owners of facilities where hazardous waste are disposed of, transporters of hazardous wastes, and those who arrange for the disposal or transport of hazardous waste. *See* 42 U.S.C. § 9607(a); *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992).

In order to make out a *prima facie* cause of action under CERCLA, Commander must establish the following:[4]

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4. Section 9607(a) states in pertinent part:

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(Cont'd)

(1) defendant fits one of the four classes of responsible parties outlined in § 9607(a); (2) the site is a facility;[5] (3) there is a release or threatened release of hazardous substances at the facility; (4) the plaintiff has incurred costs responding to the release or threatened release; and (5) the costs and response actions conform to the National Contingency Plan set up under the Act and administered by the EPA. . . .

(Cont'd)

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS § 9604(i)].

5. The term "facility" is defined as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. . . ." 42 U.S.C. § 9601(9)(B).

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Prisco v. State of New York, 902 F.Supp. 374, 381-82 (S.D.N.Y. 1995) (*citing B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992)). Absent a showing by a preponderance of the evidence that one of the affirmative defenses contained in CERCLA's § 9607(b) has been satisfied, defendant's liability for response costs is strict. *See U.S. v. A & N Cleaners and Launderers*, 854 F.Supp. 229, 237 (S.D.N.Y. 1994); *Prisco*, 902 F.Supp. at 382. Alternatively, if defendants are able to establish that they are not responsible parties as defined by § 9607(a), then they are entitled to summary judgment on the liability issue. *Prisco*, 902 F.Supp. at 382.

The undisputed facts in the record establish the last four elements of Commander's *prima facie* case. The decisive issue before the Court is whether Commander has established that the respective Defendants fall within any of CERCLA's four categories of responsible parties.

A. *Liability of Barlo as an "Owner or Operator"*

Commander seeks to establish Barlo's liability as an owner or operator of the Site pursuant to 42 U.S.C. § 9607(a)(2). Barlo argues that Commander does not make out a *prima facie* case since Barlo did not own the property, or exercise the requisite degree of control over the operations of the Site. The threshold question is therefore whether Barlo was an owner or operator of the Site by virtue of its role as a lessee and sublessor.

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Section 9601(20) provides that an "owner or operator" is "any person owning or operating such facility."[6] The redundant nature of this definition strongly implies "that the statutory terms have their ordinary meanings, rather than their technical meanings." *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988). Courts grappling with the precise boundaries of this definition have favored a liberal reading, in part to effectuate the broad remedial purpose of the statute. *See Stilloe v. Almy Bros., Inc.*, 759 F.Supp. 95 (N.D.N.Y. 1991). *See e.g., State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (stockholder who manages corporation personally liable as operator).

Indeed, rather than limiting liability to record owners of the property in question, courts have inquired as to a defendant's degree of authority and control over the facility. Generally, courts have been willing to impose CERCLA liability upon a non-owner where the defendant either (a) had the "authority to control the cause of the contamination a the time the hazardous substances were released into the environment," even if the control was never exercised, *Kaiser Aluminum v. Catellus Dev.*, 976 F.2d 1338 (9th Cir. 1992) (internal citations omitted), or (b) actually exercised substantial control over the corporation responsible for the contamination. *See City of New York v. Exxon*, 112 B.R. 540, 552-53 (S.D.N.Y. 1990) *aff'd in part*, 932 F.2d 1020 (2d Cir. 1991).

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6. We note the comment of the Ninth Circuit Court of Appeals in *Kaiser Aluminum v. Catellus Dev.*, 976 F.2d 1338 (9th Cir. 1992), "The circularity of this definition renders it useless."

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While the Second Circuit has not yet ruled on whether to adopt the "authority to control" or the "actual control" test, courts in this circuit and others specifically addressing the landlord-tenant issue have held that a lessee who has "control over and responsibility for the use of the property" is the owner of the property and thus a responsible party for purposes of CERCLA. *U.S. v. A. & N. Cleaners and Launderers, Inc.*, 788 F. Supp. 1317, 1332-33 (S.D.N.Y. 1992) (internal citations omitted). *See Nurad v. William E. Hooper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992) (tenants who have authority to control the facility are "operators"); *United States v. South Caroling Recycling and Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1985)), *aff'd sub nom, United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988) (finding that a sublessor of a facility may be liable as its owner/operator).

In the present case, the undisputed facts establish that Barlo held itself out to be the landlord of the Site, had control over the use of the land made subject of the lease, and enjoyed the benefits of ownership and control of the Site for the full term of Pasley's subtenancy. Pasely looked to Barlo as its landlord,[7] at one point requesting permission from Barlo to build the berm concrete storage area. Aside from two restrictions contained in the Barlo Lease, one in which Barlo agreed not to rent any portion of the premises to anyone having "any connection with the fuel, fuel oil or oil business," and a second which preserved Commander's right to a certain portion of the Site containing three oil storage tanks, Barlo's

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7. *See* Robert Pasley Dep. at 69, "Q: did you look to Barlo as your landlord? A: Yes."

control over the Site was complete. Neither of these restrictions mitigated Barlo's authority and control over the Site as a lessee/sublessor. Commander has therefore made out a *prima facie* case of CERCLA liability, and Barlo is liable for costs incurred as a result of the contamination of the Site.

B. *Liability of Pasley as Operator and Transporter*[8]

Commander also claims that Pasely is liable as both an operator and a transporter[9] of hazardous substances pursuant to 42 U.S.C. § 9607(a)(2) and § 9607(a)(4), respectively. As previously stated, CERCLA imposes operator liability on those individuals who participate in the operation of the facility, exercise control over, or are immediately responsible for the operation of a facility. *See Kaiser*, 976 F.2d at 1341. The Court finds that Pasely operated and exercised control over the Site from 1973 until 1982, and that its actions rendered it an operator as provided by CERCLA.

The Court finds that Pasely is also liable to Commander as a transporter of hazardous waste. The Second Circuit recently discussed CERCLA transporter liability and adopted an "active participation standard" of liability. Under this standard, a transporter must either help the generator choose

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8. The Court notes that neither Pasely nor Robert Pasely has submitted papers in opposition to Commander's Motion for Summary Judgment.

9. The terms "transport" or "transportation" are defined by CERCLA § 9601(26) as "the movement of a hazardous substance by any mode. . . ."

a disposal facility by recommendation, or play an active role in choosing the disposal facility, in order for CERCLA liability to attach. *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 521 (2d Cir. 1996).

It is undisputed that Pasely used the Site as the disposal facility chosen for the hazardous waste. Pasely used its own trucks to pick up the waste from its customers and stored the waste at the Site prior to transfer to a reclamation or final disposal facility. Pasely was therefore more than an "active participant" in the site selection process, it actually made the choice to transport the waste to the Site for storage. Pasely is therefore also liable to Commander as a transporter of hazardous waste.

C. *Liability of Robert Pasley as Operator and Transporter*

Commander asserts that Robert Pasely, the President and holder of 85% of the stock of Pasley,[10] is personally liable as an operator and transporter under CERCLA. Commander predicates Robert Pasely's personal liability upon his extensive involvement in Pasely's daily operations, including his immediate supervision over the manner in which hazardous waste was collected and stored at the Site for reclamation or disposal.

While CERCLA does not explicitly provide for personal liability of stockholders and corporate officers, courts have interpreted the statute as providing for such liability,

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10. The other 15% is held by Margaret Pasley, Robert Pasley's wife. Margaret Pasley is deceased.

concluding that "in certain circumstances an officer or shareholder of the corporate owner of a facility can be liable as an 'operator' under CERCLA even if the traditional requirements for piercing the corporate veil are not met." *Idylwoods Associates v. Mader Capital*, 915 F.Supp. 1290 (W.D.N.Y. 1996), *reconsideration in part*, 956 F.Supp. 410 (1996) (citations omitted).

The Second Circuit has squarely held that an "owning stockholder who manages the corporation . . . is liable under CERCLA as an owner or operator." *State of New York v. Shore Realty Corp.*, 759 F.2d at 1052 (imposing liability on sole shareholder and officer of corporation who was "in charge" of its management). *See City of New York v. Exxon*, 112 B.R. 540 (S.D.N.Y. 1991), *modified*, 935 F.2d 1020 (2d Cir. 1991) (parent corporation held liable as generator or transporter of hazardous waste based upon the activities of it's wholly-owned subsidiary); *Donahey v. Bogle*, 987 F.2d 1250, 1254 (6th Cir. 1992) (imposing CERCLA liability on sole shareholder of corporation because he had "authority to prevent the contamination of the property by his corporation"); *U.S. v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (parent corporation held liable for acts of subsidiary where it exercised "practical total influence" over its operations).

Robert Pasely was a majority stockholder, and the sole officer of Pasely. The Court finds that he was responsible for and exercised significant control over the daily operation and management of Pasely. (See Robert Pasley Dep. at 11.) The record also indicates that Pasely's thirteen employees were under his supervision and control. By virtue of his

control over the daily operations of Pasely, Robert Pasely is liable as an operator and transporter under CERCLA.

D. *Arranger Liability of the Remaining Defendants*[11]

Commander maintains that Pasely's customers, Consolidated, F&R, Jackson Steel, Trans World and Ultra Spray (the "Customer defendants"), are liable as generators of hazardous waste who arranged for its disposal, pursuant to 42 U.S.C. § 9607(a)(3). In its Complaint, Commander alleges that the Customer defendants "contracted and agreed or otherwise arranged with a transporter for transport, disposal or treatment of hazardous substances owned or possessed by that defendant to a facility which contained such hazardous substances." (Compl. ¶ 57.) Commander alleges that more than 10,000 gallons of waste was transported to the Site by the Customer defendants. (Commander's Mem. Supp. at 13-14; *see* Exs. 19-23, annexed to Commander's Rule 3(g) Stmt.)

Consolidated argues that Commander has failed to meet its burden of production on summary judgment by failing to submit competent evidence based upon personal knowledge to establish Consolidated activities in connection with the Site. It also disputes the factual accuracy of the information contained in paragraphs 63 to 67 of Commander's Rule 3(g) Statement, relating to the degree of Consolidated's involvement in the transportation of hazardous waste.

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11. Only Consolidated has opposed Commander's Motion for Summary Judgment; F&R, Ultra Spray, Jackson Steel and Trans World have not opposed Commander's Motion for Summary Judgment.

While CERCLA imposes liability on muse persons "who arrange for" the disposal or treatment of hazardous substances, it does not define this term. *See* 42 U.S.C. § 9607(a)(3). In attempting to ascertain the limits of arranger liability, courts have observed that CERCLA was designed to cast a wide, but not aimless net, and have therefore required intentional action on the part of the defendant in order to impose arranger liability. *Town of Windsor v. Tesa Tuck, Inc.*, 935 F.Supp. 305, 308 (S.D.N.Y. 1996) (internal citations omitted). *See United States v. Cello-Foil Products, Inc.*, 848 F. Supp. 1352, 1356 (W.D. Mich. 1994) (not all transactions which involve hazardous substances are arrangements for disposal).

The Second Circuit has refused to impose arranger liability on "any entity that merely had the opportunity or ability to control a third party's waste disposal practices. . . ." *AAMCO*, 962 F.2d at 285-86. The court reasoned that

> there must be some nexus between the potentially responsible party and the disposal of the hazardous substance. . . . In other words, Congress employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA as arrangers for the disposal of hazardous substances. Accordingly, this court concludes that it is the *obligation* to exercise control over hazardous waste disposal and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision.

AAMCO, 962 F.2d at 285.

In reaching this conclusion, the Second Circuit observed that "[a]lmost all of the courts that have held defendants liable as arrangers have found that the defendant had some actual involvement in the decision to dispose of waste." *AAMCO*, 962 F.2d at 285. *See e.g., U.S. v. Iron Mountain Mines, Inc.*, 881 F.Supp. 1432, 1451 (E.D.Cal. 1995) (arranger liability will not be imposed "on a party who never owned or possessed and never had any authority to control or duty to dispose of the hazardous substance at issue"). In short then, "liability for releases under § 9607(a)(3) . . . ends with that party who both owned the waste and made the crucial decision how it would be disposed of or treated, and by whom." *United States v. A&F Materials Co., Inc.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984).

The undisputed facts before the Court do not give rise to arranger liability as a matter of law with respect to the Customer defendants. The procedure for picking up the tanks lends no support to the conclusion that the Customer defendants had "actual involvement" in the waste disposal decision. The waste transport procedure is described in the Complaint as follows:

> Pasley picked up hazardous substances from its customers, transplanted them to the site, stored them on the site and eventually delivered or caused them to be delivered to a final solid waste management facility.

(Compl. ¶ 37.)

Pasley's application for approval to operate a solid waste management facility, dated September 24, 1980, recites:

> We deliver in our own trucks. We sell to about 300 customers in the New York Metropolitan area.
>
> Waste drums are trucked in from customers and stored in the waste storage area.

A district court addressing similar facts also determined that arranger liability was inappropriate. In *Cello-Foil Products*, 848 F. Supp. at 1358, defendants, customers of plaintiffs, returned drums containing hazardous waste to the supplier for the purpose of reclaiming their deposits. The court granted summary judgment for the customer defendants, holding that "defendants are not liable under section 107(a)(3) absent a showing that they intended to dispose of the residual amounts of the hazardous substances remaining in their returned drums." *Cello-Foil Products*, 848 F.Supp at 1358.

Similarly, the record before the Court is barren of any showing that the Customer defendants took affirmative action in disposing of hazardous waste, or that the Customer defendants were under an "*obligation* to exercise control over hazardous waste disposal," as required to impose liability under the statute. Commander's motion for summary judgment against the Customer defendants is denied, and its claims against the Customer defendants are dismissed.

The Court is cognizant that the Customer defendants have not opposed Commander's Motion for Summary Judgment, due to their apparent financial insolvency. However, it is well within the Court's powers to grant

summary judgment in favor of a nonmoving party, in the absence of a cross-motion, where the undisputed facts show that such party is entitled to judgment as a matter of law, the facts before the court are fully developed, and the moving party suffers no procedural prejudice. *See Coach v. Leatherware Co. v. Ann Taylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991); *Lowenschuss v. Kane*, 520 F.2d 255 (2d Cir. 1975); *D'Agostino v. New York State Liquor Authority*, 913 F.Supp. 757, 769 (W.D.N.Y. 1996); *Montgomery v. Scott*, 802 F.Supp. 930, 935 (W.D.N.Y. 1992).

IV. *Commander's RCRA Claims*:

Commander also seeks monetary, injunctive and declaratory relief pursuant to RCRA's citizens suit provision, 42 U.S.C. § 6972(a)(1)(B), for all future response actions necessary to carry out the Record of Decision and Amended Record of Decision relating to the Site.

Barlo argues that Commander's RCRA claim must be dismissed because RCRA forbids a private plaintiff from seeking monetary damages, and that in any case, it is not liable as a responsible party under RCRA because it is not an "owner or operator" of the Site. It also argues that Commander's RCRA citizen suit is barred as a matter of law because of the Consent Decree it entered into pursuant to CERCLA §§ 106 and 107.

A. *The Prima Facie Case*

RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), provides that a plaintiff may bring a civil action

> against any person . . . and including any past or present generator, past or present transporter, past or present owner or operator of a treatment, storage or disposal facility, who has contributed to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Under this section, private plaintiffs must demonstrate

> (1) that the conditions at the site may present an imminent and substantial endangerment to health or the environment, (2) that the endangerment stems from the past or present handling, treatment or disposal of solid or hazardous waste, and (3) that the defendant contributed to such handling, treatment or disposal of the solid or hazardous waste.

Acme Printing Ink Co. v. Menard, Inc., 870 F.Supp. 1465, 1478 (E.D. Wis. 1994) (citations omitted).

Like CERCLA, RCRA sets a strict liability standard; once a *prima facie* case is established, liability will be imposed "without fault or negligence." *U.S. v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 740 (8th Cir. 1986). As recently described by the Supreme Court,

> RCRA is a comprehensive environmental statute that governs the treatment, storage and disposal

> of hazardous waste. *See Chicago v. Environmental Defense Fund*, 511 U.S. 328, __, 114 S. Ct. 1588, 1590-91 (1994). Unlike [CERCLA], RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. *Cf. General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990). . . . RCRA's primary purpose, rather, is to reduce the generation of hazardous waste and to ensure the proper treatment, storage and disposal of that waste which is nonetheless generated, "so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b).

Meghrig v. KFC Western, Inc., __ U.S. __, __, 116 S. Ct. 1251, 1253 (1996).

RCRA's citizen suit remedies are circumscribed; a district court is authorized only to "restrain any person who has contributed to or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . , [or] to order such person to take such other action as may be necessary, or both." 42 U.S.C. § 6972(a).

The Supreme Court has held that the plain language of this provision limits citizen suits to prospective relief, in the form of either a mandatory injunction, or a prohibitory injunction, reasoning that "RCRA's citizen suit provision

was not intended to provide a remedy for past cleanup costs." *Meghrig*, __ U.S. at __, 116 S. Ct. at 1255. This conclusion is consistent with RCRA's goal of preventing the creation of hazardous waste in the first place rather than promoting the cleanup of existing sites, and with the legislative history of RCRA which "indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Furrer v. Brown*, 62 F.3d 1092, 1098 (8th Cir. 1995) (citations omitted).

Commander's RCRA Complaint seeks both monetary and equitable relief with respect to past and future clean-up based upon Defendants' contribution "to the past handling, storage, treatment, transportation and disposal of hazardous wastes which may have presented and may still present an imminent and substantial endangerment to health or the environment." (Compl. ¶ 65.) Only Commander's claims for injunctive or declaratory relief resting upon "allegation[s] that the contaminated site presently poses an 'imminent and substantial endangerment to health or the environment,' " may go forward. Commander's RCRA claims predicated upon recovery of past response costs, regardless of whether such costs are denominated "damages" or "equitable restitution," must be dismissed. *See Meghrig*, __ U.S. at __, 116 S. Ct. at 1256.

B. *RCRA's Prohibition Provisions*

The Court need not address whether Commander has made out its *prima facie* case for equitable relief from future harm under RCRA, because, as pointed out by Barlo,

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Commander is barred from bringing a private citizen action as a matter of law. (Barlo Mem. Opp. at 42.)

RCRA's section 9672(b)(2)(B) provides that

> No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed to the activities which may present the alleged endangerment,
>
> . . . .
>
> > (iv) has obtained a court order (including a consent decree) or issued an administration order under section 106 of [CERCLA] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study or proceeding with a remedial action.
>
> In the case of an administrative order referred to in clause (iv), actions under (a)(1)(B) are prohibited for the duration of the administrative order referred to in clause (iv).

See generally, U.S. v. State of Colo., 990 F.2d 1565 (10th Cir. 1993); *O'Leary v. Moyer's Landfill, Inc.*, 677 F.Supp. 807 (E.D.Pa. 1988); *McGreagor v. Industrial Excess Landfill, Inc.*, 709 F.Supp. 1401 (N.D. Ohio 1987).

In short, RCRA's restriction on citizen suits applies where "the EPA Administrator has (1) obtained a court order (including a consent decree) or (2) issues an administrative order under CERCLA § 106 or RCRA § 7003." *Acme Printing*, 870 F.Supp at 1507.

The Administrative Order dated August 18, 1988 between the EPA and Commander was executed under the authority of CERCLA §§ 104(a) and (b) and 122(d)(3); it is therefore not properly the subject of §6972(b)(2)(B)(iv)'s prohibition. *See Acme Printing*, 870 F.Supp. at 1507.

However, on January 26, 1996, pursuant to CERCLA's §§ 106 and 107, Commander and the certain settling defendants entered into a Consent Decree, whereby the parties agreed to design and implement response actions at the Site and to reimburse the United States for past and future response costs incurred in connection with the Site. (See Consent Decree, annexed at Ex. 13 to Commander's Rule 3(g) Stmt.)

The Consent Decree is plainly the subject of RCRA's prohibition against citizen suits. At oral argument, counsel for Commander indicated that the remedy set forth in the Record of Decision relating to the Consent Decree was in the design stage, and that it would progress to the construction stage next year. (Tr. at 25.) Commander's RCRA action is therefore barred at present and for the duration of the remedy provided for in the Consent Decree and Record of Decision.

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V. *Commander's New York ECL Claims*

Commander asserts that the Defendants are liable for violations of Article 27, Title 9 of New York's ECL, §§ 27-0911 and 27-0913, New York's federally authorized program under RCRA to regulate the treatment, storage and disposal of solid and hazardous waste. Barlo claims that Commander's ECL claims must be dismissed because the ECL does not provide for citizen suits related to violations of Article 27. (Barlo's Mem. Opp. at 43.) Commander acknowledges that the ECL only authorizes the Attorney General and Department of Environmental Conservation to enforce violations of Article 27, but urges the Court to imply a private right of action based upon legislative intent. (Commander's Reply Mem. Opp. at 16.)

The Court finds no support for an implied right of action in the legislative history or elsewhere. Indeed, the limited amount of authority on the issue of an implied private right of action under ECL's Article 27 supports Barlo's position that such a right was not intended by the legislature. The Appellate Division, Fourth Department has held that because the ECL "specifically authorizes the Attorney General to enforce 'any rule or regulation promulgated pursuant' to ECL article 27, (ECL 71-2727(2)) . . . the statute does not confer a private cause of action." *Town of Wilson v. Town of Newfane*, 581 N.Y.S.2d 962, 963, 181 A.D.2d 1045, 1046 (4th Dep't 1992).

Commander's ECL claims are therefore dismissed.

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VI. *Commander's Common Law Environmental Claims*

Commander asserts several tort-based common law claims against the Defendants, including negligence, trespass, waste, maintenance of a private and public nuisance under common law and RPAPL § 841, and strict liability for conducting abnormally dangerous activity. Barlo urges the Court to decline to exercise pendent jurisdiction over Commander's state claims. In the alternative, Barlo requests leave from the Court to amend its answer to assert the affirmative defense of statute of limitations, so that it may argue that these claims are time barred.

A. *Pendent Jurisdiction*

The doctrine of pendent jurisdiction permits a federal district court to retain jurisdiction over state law claims whenever the state and federal claims "clearly derive from a common nucleus of operative fact" and . . . [the plaintiff] would ordinarily be expected to try them in one judicial proceeding." *Shore Realty*, 759 F.2d at 1050 (2d Cir. 1985) (citations omitted). The question of whether to exercise pendent jurisdiction is within the discretion of the district court and should be guided by considerations of "judicial economy, convenience, fairness and comity." *Buti v. Impressa Perosa*, 935 F.Supp. 458, 474-75 (S.D.N.Y. 1996) (citations omitted). *Accord, Block v. First Blood Associates*, 988 F.2d 344, 351 (2d Cir. 1993).

An examination of these factors supports the Court's exercise of pendent jurisdiction in the present case. Interests of convenience and judicial economy clearly weigh in favor

of trying the state claims together with Commander's federal claims; separate trials would require virtual duplication of documentary evidence and witness testimony. Moreover, the state law claims do not dominate Commander's suit, nor would a joint trial result in confusion. The Court will therefore exercise pendent jurisdiction to decide whether Commander's state common law claims may go forward.[12]

B. *Leave to Amend and Statute of Limitations*

Pursuant to Federal Rule of Civil Procedure 15(a), Barlo moves to amend its pleadings to assert the affirmative defense of statute of limitations. Rule 8(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." Fed.R.Civ.Pro. 8(c). *See Winmar Co. v. Teachers Ins. & Annuity Ass'n*, 870 F.Supp. 524, 533 (S.D.N.Y. 1994). The failure to raise a statute of limitations defense in an answer operates as a waiver of the defense, unless the party is able to take advantage of the exception provided by Federal Rule of Civil Procedure 15(a) which "freely" permits amendment "when justice so requires." Fed.R.Civ.Pro 15(a). *See Winmar*, 870 F.Supp. at 533.

The rule in this and other circuits is that mere delay, absent bad faith or undue prejudice, will not provide a basis

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12. The Court's exercise of pendent jurisdiction is essentially for purposes of addressing Barlo's statute of limitations defense. As discussed *infra*, Commander's common law claims are barred as untimely.

for denial of leave to amend. *See Block*, 988 F.2d at 350; *Pisello v. Town of Brookhaven*, 933 F.Supp. 202, 219 (E.D.N.Y. 1996). At the same time, the Court is cognizant that "the longer the period of unexplained delay, the less will be required of the non-moving party in terms of a showing of prejudice." *Town of New Windsor v. Tesa Truck, Inc.*, 919 F.Supp. 662, 675 (S.D.N.Y. 1996).

In determining whether a party has suffered prejudice, the main factors to be considered are "whether the assertion of the new claim would (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction." *Block*, 988 F.2d at 350.

In the present case, Barlo's answer was filed on August 14, 1990. Barlo's previous attorney failed to assert the statute of limitations defense. Barlo's present counsel was retained on March 13, 1993, and failed to assert the limitations bar for almost four years. While this time period is significant, Barlo correctly points out that the matter has been prosecuted and defended all along as an environmental cleanup cost and recovery action, with discovery directed toward CERCLA issues. At oral argument, Commander was not able to establish prejudice of any kind; nor did counsel for Commander allege any bad faith on the part of Barlo. (Tr. at 52-54; 62-63.) Barlo's motion to amend its answer to assert the defense of statute of limitations is therefore granted and its pleading is deemed amended.

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C. *The Statute of Limitations Defense*

Barlo argues that Commander's common law claims for negligence, trespass, nuisance, waste, and strict liability are governed by New York's CPLR § 214-c(2). This section provides a three year limitations period for actions for property damage caused through contamination by toxic substances. As set forth by the New York Court of Appeals in *Jensen v. General Electric Co.*, 82 N.Y.2d 77, 623 N.E.2d 547, 603 N.Y.S.2d 420 (1993), the limitations period begins to accrue from the date of discovery of the toxic harm.

Barlo contends that under *Jensen*, Commander's claims for *both* monetary and equitable relief are time barred. This reading of *Jensen* is far too expansive. Commander correctly points out that *Jensen*'s date of discovery rule applies only to actions to recover *damages* and not "to the availability of such tort theories to a party seeking injunctive or equitable relief" based upon continuing trespass and nuisance. (Commander's Mem. Opp. at 25.) Commander therefore argues that its equitable claims are timely under *Jensen*.

In *Jensen*, the Court of Appeals wrote that the Legislature "intended no continuing wrong exception to its new comprehensive across the board rules." It continued that "[s]ince by its terms the discovery rule of CPLR § 214-c(2) applies only to actions for damages and not to injunctive relief, the common-law accrual method is applicable. Therefore, equitable injunctive relief may be available and should be scrutinized under the usual array of considerations for such matters." 82 N.Y.2d at 90-91, 623 N.E.2d at 553, 603 N.Y.S.2d at 426.

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Under the *Jensen* date of discovery rule, Commander's claims for compensatory damages are dismissed as time barred. The record establishes that Commander was on notice of the contamination at the Site at least as early as July 1973, when Commander received notice from the Nassau County Fire Marshall alleging that there had been chemical spills at the Site, and at the latest as of March 10, 1983, when the DEC filed an administrative complaint against Commander relating to the Site. Thus, the limitations period expired, at the latest date, on March 10, 1986. Commander did not file the summons and complaint until 1990. Commander's claims for damages based upon New York common law are therefore dismissed as time barred.

While Commander's equitable claims might be timely under the doctrine of continuing trespass, the Court cannot discern, what, if any equitable relief Commander seeks. At oral argument, Commander was unable to articulate the equitable relief to which it was entitled. (Tr. at 63-64.) Counsel for Commander suggested that the Court "grant Commander a judgment saying it has the right to compel Barlo to perform the remedy . . . to abate the nuisance that they allowed to be created on our property. . . ." (Tr. at 63-64.) Commander's request is not a form of relief available from this Court. Thus, Commander's state-based tort claims are dismissed in their entirety.

VII. *Joint & Several Liability*

Having decided that Barlo, Pasely and Robert Pasely are liable to Commander under CERCLA for damages relating to the contamination of the Site, the Court now comes

to Commander's request for relief, holding the Defendants jointly and severally liable for its past and future response costs under CERCLA § 9607(a)(4), and for contribution under CERCLA § 9613(f).

Barlo's position is that Commander, a potentially responsible party (a "PRP"), may not pursue a claim for joint and several liability under §9607(a)(4)(A), while seeking contribution under § 9613(f). Moreover, Barlo contends that in a private claim for contribution under § 9613(f), liability is not joint and several. (Barlo's Mem. Supp. at 49.)

Barlo urges the Court to adopt the line of cases which limit responsible parties and PRPs to contribution claims and preclude the use of § 107(a). *See U.S. v. Colorado & Eastern Railroad Co.*, 50 F.3d 1530 (10th Cir. 1995); *United Technologies v. Browning-Ferris*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1176 (1995); *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); *Town of Windsor v. Tesa Tuck, Inc.*, 919 F.Supp. 662 (S.D.N.Y. 1996); *Folino v. Hampden Color and Chemical Co.*, 832 F.Supp. 757, 763 (D.Vt. 1993).

Commander urges the Court to adopt the view of a competing line of cases which permit PRPs to pursue claims for joint and several liability. *See Idylwoods Associates v. Mader Capital*, 915 F.Supp. 1290, 1313 (W.D.N.Y. 1996), *reconsideration in part*, 956 F.Supp. 410 (1996); *Town of Wallkill v. Tesa Tape Inc.*, 891 F.Supp. 955 (S.D.N.Y. 1995) (PRP entitled to maintain a claim for both joint & several liability and for contribution against other PRPs); *Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F.Supp.

159, 164 (W.D. Ky. 1995) (holding that liable or potentially liable parties are not limited to § 113 relief, but may also pursue claims under § 107 for joint and several liability); *Companies for Fair Allocation v. Axil Corp.*, 853 F.Supp. 575 (D.Conn. 1994) (Congress intended § 107 liability to sweep broadly).

In the alternate, Commander contends that the Court should at least adopt the "innocent owner" exception, which permits a non-responsible party to pursue a claim for joint and several liability concurrently with a claim for contribution. *See e.g.*, *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235 (7th Cir. 1997); *AM Intern., Inc. v. Datacard Corp.*, 106 F.3d 1342 (7th Cir. 1997). Commander contends that because it did not contribute in any way to the hazardous condition of the Site, has not admitted responsibility for the hazardous waste at the Site, but faces CERCLA liability solely as a result of its status as a landowner, it is an "innocent owner" capable of bringing a cost recovery action under both CERCLA § 107(a) and § 113. (Commander's Mem. Opp. at 30.)

A brief history of CERCLA's provisions for contribution and joint and several liability is helpful before tackling the questions presented. CERCLA did not originally provide for contribution actions. Instead, only actions for recovery pursuant to § 107 were available to parties involved in site cleanup.[13] Prior to 1986, courts used common law principles

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13. Section 107 of CERCLA, 42 U.S.C. § 9607(a) provides that certain enumerated parties — "potentially responsible persons" — (Cont'd)

to imply rights of action for contribution and indemnity among PRPs, where necessary to alleviate the burden of joint and several liability under § 107. *See Pinal Creek Group v. Newmont Min. Corp.*, 926 F.Supp. 1400, 1404 (D. Ariz. 1996).

In 1986, Congress passed the Superfund Amendments and Reauthorization Act ("SARA"), adding an express cause of action for contribution to the CERCLA statutory framework.[14] The principle goal of this provision was to clarify and confirm "the right of a person held jointly and

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(Cont'd)

> shall be liable for . . . all costs of removal or remedial action incurred by the United States Government . . . ; [and] any other necessary costs of response incurred by any other person consistent with the national contingency plan.

14. Section 113(f) provides a three year statute of limitations and reads, in pertinent part:

> (1) Contribution
>
> Any person may seek contribution from any other person under section 9607(a) of this title during or following any civil action under section 9606 of this title or section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable principles as the court determines are appropriate. Nothing in this section shall diminish the right of any person to bring an action in contribution in the absence of civil action under section 9606 of this title or section 9607 of this title.

severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup costs that may be greater than its equitable share under the circumstances." *Browning-Ferris*, 33 F.3d at 100 (*quoting*, S.Rep. No. 11, 99th Cong. Sess. 44 (1985), *reprinted in* 2 Legislative History of the Superfund Amendments and Reauthorization Act of 1986, 636, Sp. Print 101-120 (101st Cong., 2d Sess.) (1990)).

There is a sharp divide among courts with respect to the issue of whether a PRP may pursue a CERCLA § 107 claim concurrently with a claim for contribution. A relative minority of courts permit PRPs to freely pursue cost recovery actions pursuant to § 107. *See Idylwoods Associates v. Mader Capital*, 915 F.Supp 1290, 1313 (W.D.N.Y. 1996), *reconsideration in part*, 956 F.Supp. 410 (1996); *Town of Walkill v. Tesa Tape Inc.*, 891 F.Supp. 955 (S.D.N.Y. 1995) (PRP entitled to maintain a claim for both joint and several liability and for contribution against other PRPs); *Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F.Supp. 159, 164 (W.D. Ky. 1995) (holding that liable or potentially liable parties are not limited to § 113 relief, both may also pursue claims under § 107 for joint and several liability).

These courts have reasoned that "[w]hether a PRP seeks relief against another PRP under § 107 or § 113 is of little consequence . . . as it is a question of ligation tactics of the parties. If, when Congress recognized contribution as an available remedy in CERCLA actions, it wished to require a PRP to utilize only § 113 in seeking reimbursement of response costs, it could have said so." *Idylwoods Associates*, 915 F.Supp. at 1313.

The Court finds this rationale unpersuasive, and instead endorses the view of the majority of courts addressing this issue, which refuse to recognize the ability of PRPs to pursue claims for joint and several liability, but acknowledge the potential for an innocent owner to bring such a claim. *See New Castle County v. Halliburton Nus Corp.*, 111 F.3d 1116 (3d Cir. 1997), No. 96-7443, 1997 WL 217627 at *3 (3d Cir. May 2, 1997); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235 (7th Cir. 1997); *Town of Windsor v. Tesa Tuck, Inc.*, 919 F.Supp. 662 (S.D.N.Y. 1996) (parties who are not themselves liable or potentially liable for response costs can bring a direct cost recovery action under § 107(a) against PRPs).

The prohibition against § 107 suits by PRPs finds support on many levels. First, drawing from basic tort principles, courts have reasoned that a plaintiff who itself is a "party liable in some measure for the contamination. . . . [has] a quintessential claim for contribution [under § 113(f)]." *Rumpke*, 107 F.3d at 1240 (*quoting Akzo*, 30 F.3d at 764). *See Redwing Carriers Inc. v. Saraland Apts.*, 94 F.3d 1489, 1513 (11th Cir. 1996) (parties who are not themselves liable or potentially liable may bring a cost recovery action directly under § 107 against PRPs, although the typical § 107 action is brought by a governmental plaintiff).

This view is also supported by Congressional action in passing SARA. As recently expressed by the District Court for the Southern District of New York in *Town of Windsor*, "Congress would not have taken the time to codify the right of contribution in § 113(f) if a responsible party or potentially

responsible party all along had the right to seek to impose joint and several liability under § 107." *Town of Windsor*, 919 F.Supp. at 681. This limitation also finds support on a purely practical level: "if a responsible party or potentially responsible partly were permitted to bring a claim for joint and several liability under § 107(a), which has a six year statute of limitations, the three year statute of limitations on § 113(f) would be eviscerated because a party with a claim barred under § 113(f) could proceed under § 107(a)." *Town of Windsor*, 919 F.Supp. at 681. Finally, limiting responsible parties to contribution claims makes sense as a matter of policy," since "it will halt the ancillary litigation and third-, fourth- and fifth- party practice that typically bogs down CERCLA litigation." *Town of Windsor*, 919 F.Supp. at 681.

The Third Circuit in *New Castle* shared the view that "a section 107 action brought for recovery of costs may be brought only by innocent parties that have undertaken cleanups. An action brought by a potentially responsible party is by necessity an action for contribution." *New Castle*, 111 F.3d at __, No. 96-7443, 1997 WL 217627 at * 3 (citations omitted). The Third Circuit rejected New Castle's argument that section 107 joint and several liability should be available to PRPs and should not be limited to innocent parties. The court wrote:

> while section 107 permits recovery by any person, the "person" must experience an injury of the type giving rise to a claim under section 107 to obtain relief under that section. *Akzo*, 30 F.3d at 764. Since section 107 was designed to enable *innocent persons* who incur expenses cleaning up a site to

> recover their costs from PRPs, a PRP does not experience section 107 injury and cannot obtain section 107 relief. Instead a claim by a PRP is 'a quintessential claim for contribution.' *Id.* Section 113(f) confirms this fact, permitting party to seek contribution from "any other" party potentially liable under section 107. *Id.* (emphasis added).

When left with the question of "[w]ho . . . may properly bring a cost recovery action under section 107," the Third Circuit answered that "[w]hile section 107 historically has been used by governments to recover costs incurred in the clean-up of hazardous sites, it is possible that a private person may be permitted to recover costs under section 107." *New Castle*, 111 F.3d at __, 1997 WL 217627 at * 6. The court did not decide "under what circumstances a private person may rely on section 107," or whether to endorse the "innocent landowner" exception. It merely stated that "a potentially responsible party under section 107(a), who is not entitled to any of the defenses enumerated under section 107(b), may not bring a section 107 action against another potentially responsible person." *New Castle*, 111 F.3d at __, 1997 WL 217627 at * 6.

It was not necessary for the Third Circuit in *New Castle*, or for the Southern District in *Town of Windsor* to go as far as to adopt the "innocent landowner" exception, because the parties seeking to pursue claims for joint and several liability were indeed PRPs themselves. However, other courts have addressed circumstances warranting the application of this exception.

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In *Rumpke*, 107 F.3d 1235 (7th Cir. 1997), the Seventh Circuit addressed a situation in which the owner of a contaminated landfill, whose CERCLA liability was predicated solely on its ownership of the site, sought to impose joint and several liability upon the actual contaminators of the site. Rumpke had not contributed to the presence of the hazardous substances, but had acquired the site without knowledge of environmental hazards and after the deposits had been made. Rumpke was informed at the time of purchase that the site had never received hazardous waste.

The court was asked to address the question of whether the "innocent owner" exception recognized in *Akzo* was available to an owner such as Rumpke, or if it was limited to "a narrower group of parties, such as the landowner who discovers someone surreptitiously dumping wastes onto his land?" *Rumpke*, 107 F.3d at 1240. The court concluded that Rumpke was entitled to sue, stating "[i]f one were to read § 107(a) as implicitly denying standing to sue even to landowners like Rumpke who did not create the hazardous condition, this would come perilously close to reading §107(a) itself right out of the statute." The court continued that

> this position would "mean that section 107(a) private party plaintiff will be few and far between. Truly innocent private party plaintiffs would be limited to, for example, a neighbor of a contaminated site who had acted to stem threatened releases for which he is not responsible, see *Akzo*, 30 F.3d at 764, or a party

> who can claim one of the complete defenses set forth in 42 U.S.C. 9607(b)."

107 F.3d at 1241 (quoting *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F.Supp. 790 (D.N.J. 1996)). Thus, under *Rumpke*, "landowners who allege that they did not pollute the size in any way may sue for their direct response costs under "107(a)." 107 F.3d at 1241.

In *AM Intern., Inc. v. Datacard Corp.*, 106 F.3d 1342 (7th Cir. 1997), the Court of Appeals for the Seventh Circuit again had the opportunity to apply and clarify the "innocent landowner" exception. The court permitted the landowner plaintiff to sue under § 107(a), despite the fact that the landowner had purchased the contaminated property in question at a lower price due to its knowledge that it was buying an expensive cleanup. The court stated:

> [w]hile that may have rendered Datacard a little less innocent than the landowner described in *Akzo*, Datacard did not take part in the manufacture of Blankrola [the contaminating chemical in question]." Instead, Datacard — like a party forced to clean up contamination on its property due to a third party's spill — faces liability merely due to his status as a landowner. As a result, Datacard qualifies under *Akzo*'s exception and can pursue its response costs under § 107(a)(4)(B).

AM Intern., 106 F.3d at 1347.

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This Court finds the rationale underlying the "innocent owner" exception persuasive and well-reasoned. This rule is consistent with basic principles of joint and several liability, and effectuates CERCLA's goal of avoiding the harsh result of burdening innocent parties with the full burden of cleanup costs. Moreover, "[s]ince section 107 was designed to enable *innocent* persons who incur expenses cleaning up a site to recover their costs from PRPs," *see New Castle*, 111 F.3d at __, 1997 WL 217627 at * 4 (emphasis added), allowing a plaintiff to maintain a § 107 claim, in the event it establishes it was without fault with respect to the facility, will not contravene the statute's recovery scheme or purpose.

In the present case, Commander's CERCLA liability was predicated on its status as a landowner. A question remains as to whether Commander, a company engaged in the fuel and oil business, actually contributed to the hazardous condition of the Site, precluding the availability of a section 107 claim. Indeed, the Barlo Lease reserved unto Commander the use of three oil storage tanks for its fuel oil business (Barlo Lease ¶ 27.)[15]

In addition, Commander may be chargeable with knowledge of the contamination by virtue of its relationship with Pasely as its landlord from 1969 until 1972, and as Barlo's landlord from 1972 until 1989. Commander was aware that Pasely was in the business of chemical distribution and storage for the duration of its tenancy, and certainly had the ability to stop the contamination as the owner of the Site

15. At oral argument, there was much heated debate over the degree to which Commander was responsible for creating the hazardous condition of the Site. *See* Tr. at 24-27; 49-52.)

and Pasely's and Barlo's landlord. Thus, while Commander may not have actively contributed to the hazardous condition, it may be that Commander is not truly blameless for the Site.

The Court will hold an evidentiary hearing on damages on July 8, 1997 at 10:00 A.M. At that time the parties will offer evidence on the issue of Commander's status as an innocent party and its ability to maintain its action for joint and several liability against the Defendants.

VIII. *Commander's Claim for Contribution*:

In any event, Commander certainly may pursue a § 113(f) claim for contribution against the Defendants. In allocating fault and response costs pursuant to § 113(f), the Court is guided by "the essential policy underlying CERCLA, [which] is to place ultimate responsibility for cleaning up hazardous waste on those responsible for [the] problems caused by the disposal of chemical poison." *Redwing*, 94 F.3d at 1514. While courts are to employ equitable factors as "deemed appropriate" in allocating costs, *see* 42 U.S.C. § 9613(f)(1), the primary consideration in allocating responsibility is the concept of relative fault. *See Alcan-Toyo America v. Northern Ill. Gas*, 981 F.Supp. 342, 345 (N.D. Ill. 1995) (citations omitted). Other factors which courts have looked to in this regard include the relevant Gore factors[16],

16. The "Gore Factors" include the amount and degree of toxicity of the hazardous waste, the degree of care exercised by the parties, the degree of cooperation with government by the parties, and the relative fault of the parties. These factors were proposed by then Congressman Albert Gore as a moderate approach to joint and several liability. *See Environmental Transportation Systems v. Ensco, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992).

any contracts between parties bearing on allocation of clean-up costs, *see Kerr-McGee Chemical v. Lefton Iron & Metal*, 14 F.3 321 (7th Cir. 1994), the amount of hazardous metals involved, and to the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment. *See AAMCO*, 889 F.2d at 672-3.

Addressing the culpability of the various parties involved, it is clear that Pasely and Robert Pasely were ultimately responsible for the contamination of the Site. Pasely and Robert Pasely are therefore primarily liable for the full amount of Commander's clean-up costs.

With respect to Barlo, the record is barren of any evidence to suggest that it actually contributed to the contamination of the Site. Barlo's strict liability as an "owner" under CERCLA, predicated on its status as a lessee/sub-lessor of the Site, is not an indicator of its fault and does not provide a basis upon which this Court is prepared to impose sweeping monetary liability for Commander's clean-up costs. While Barlo may bear some of the costs by virtue of its position as lessor/sub-lessee, the Court emphasizes that Pasely and Robert Pasely are wholly responsible for introducing the contaminants to the Site.

The Court cannot at this point assign a percentage of fault to Barlo. Therefore, at the evidentiary hearing on Commander's status as an innocent owner and its standing to sue for joint and several liability under § 107, the Court will also receive evidence bearing on the degree to which Commander's response costs should be shouldered by Barlo.

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The parties are directed to agree upon and to submit to the Court, prior to the hearing on July 8, 1997, a list of undisputed relevant facts and a list of disputed relevant facts with respect to the allocation of response costs and apportionment of liability.

IX. *Jury Trial*

At oral argument, Barlo presented a demand for a jury trial on Commander's CERCLA claims.[17] Most courts addressing the question of whether CERCLA provides for a jury trial have held that "CERCLA's language and legislative history lack any evidence of intent to have the claims determined by a jury." *Hatco Corp. v. W.R. Grace & Co.*, 59 F.3d 400, 411-12 (3d Cir. 1995).

In *State of New York v. Lashins Arcade Co.*, 881 F.Supp. 101, 102 (S.D.N.Y. 1996), the Southern District held to the contrary, reasoning that "Congress intended the right to a jury trial in a case where a plaintiff seeks a judgment for money damages for clean-up costs as well as injury to natural resources under section 107 of CERCLA." However, this result was questioned by the court of appeals for the Second Circuit. *See State of New York v. Lashins Arcade Co.*, 91 F.3d 353, 362 n.7 (2d Cir. 1996) ("We caution . . . that the district court's ruling stands alone (so far as we are aware)) (*citing Hatco Corp. v. W.R. Grace & Co.*, 59 F.3d 400, 411-12 (3d Cir. 1995); *U.S. v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 749 (8th Cir.

17. By letter dated May 30, 1997, Commander withdrew its jury demand.

1986), *cert. denied*, 484 U.S. 848, 108 S. Ct. 146 (1987); *U.S. v. Mexico Feed & Seed Co.*, 729 F.Supp. 1250, 1254 (E.D. Mo. 1990); *U.S. v. Northernaire Plating Co.*, 685 F.Supp. 1410, 1413 (W.D.Mich. 1988), *aff'd sub. nom., U.S. v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057, 110 S. Ct. 1527 (1990)).

The Court agrees with the weight of authority on this issue, that CERCLA's statutory scheme is essentially equitable in nature and does not contemplate the right to trial by jury. The liability issues not disposed of herein will be heard and decided by the Court sitting without a jury.

ORDER

Commander's motion for partial summary judgment against Barlo, Pasely and Robert Pasely on the issue of CERCLA liability is granted. Commander's motion for partial summary judgment against the Customer defendants, Consolidated, F&R Display, Jackson Steel, Transworld Optics, and Ultra Spray, on the issue of CERCLA liability is denied. Commander's claims against the Customer defendants are dismissed.

Barlo's cross-motion for summary judgment dismissing Commander's RCRA, ECL and New York common law claims is granted.

The parties are directed to appear before the Court on July 8, 1997 at 10:00 A.M. for an evidentiary hearing. Issues relating to apportionment of damages with respect to contribution and the potential joint and several liability of

the Defendants will be decided by the Court in conformity with this Memorandum of Decision and Order.

SO ORDERED.

s/ Jacob Mishler
JACOB MISHLER,
U.S. District Judge

APPENDIX E — RELEVANT STATUTES

42 U.S.C. § 9601

§ 9601. Definitions

For purpose of this subchapter —

(1) The term "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(2) The term "Administrator" means the Administrator of the United States Environmental Protection Agency.

(3) The term "barrel" means forty-two United States gallons at sixty degrees Fahrenheit.

(4) The term "claim" means a demand in writing for a sum certain.

(5) The term "claimant" means any person who presents a claim for compensation under this chapter.

(6) The term "damages" means damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title.

(7) The term "drinking water supply" means any raw or finished water source that is or may be

used by a public water system (as defined in the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.]) or as drinking water by one or more individuals.

(8) The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

(10) The term "federally permitted release" means (A) discharges in compliance with a permit under section 1342 of Title 33, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section

1342 of Title 33 and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of Title 33, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 1344 of Title 33, (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 U.S.C.A. § 6925(a) to (d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 1412 of Title 33 of section 1413 of Title 33, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 U.S.C.A. § 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. § 7411], section 112 [42 U.S.C.A. § 7412], Title I part C [42 U.S.C.A. § 7470 et seq.], Title I part D [42 U.S.C.A. § 7501 et seq.], or State implementation plans

submitted in accordance with section 110 of the Clean Air Act [42 U.S.C.A. § 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 1317(b) or (c) of Title 33 and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 1342 of Title 33, and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

(11) The term "Fund" or "Trust Fund" means the Hazardous Substance Superfund established by section 9507 of Title 26.

(12) The term "ground water" means water in a saturated zone or stratum beneath the surface of land or water.

(13) The term "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this chapter.

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas

liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

(15) The term "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas.

(16) The term "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

(17) The term "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.

(18) The term "onshore facility" means any facility (including, but not limited to, motor vehicles

and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States.

(19) The term "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party.

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

* * *

Appendix E

42 U.S.C. § 9607

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a

release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

* * *

Appendix E

42 U.S.C. § 9613

§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be

brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

* * * *

Supreme Court, U.S.
FILED
OCT 05 2000
CLERK

(2)

No. 00-373

IN THE

Supreme Court of the United States

COMMANDER OIL CORP.,

Petitioner,

v.

BARLO EQUIPMENT CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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160P

STATEMENT PURSUANT TO RULE 29.6

Respondent Barlo Equipment Corporation ("Barlo") has no corporate parent and no publicly held company holds ten percent or more of its stock.

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REASONS FOR DENYING THE WRIT

The Court of Appeals for the Second Circuit concluded that "under the circumstances of this case," including particularly the specific lease terms, Pet. 3a, Barlo, the lessee of property as to which petitioner and titleholder Commander Oil Corp. ("Commander Oil") had "retained many of the rights and obligations of ownership," Pet. 20a, was not liable as an "owner" within the meaning of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9607(a)(1). This determination was correct because the record clearly established that Barlo had no involvement with nor control over the site activity which led to the contamination, eliminating any basis to treat it as the site "owner."

Because the rationale for the Court of Appeals' rejection of lessee/sublessor status as a basis for CERCLA "owner" liability here was fact-driven, it does not present a square conflict with other decisional authority. Moreover, unlike the situation before this Court in *United States v. Bestfoods*, 524 U.S. 51 (1998), the issue has not arisen in a large number of instances.

In any event, the rejection of site control as a basis for "owner" rather than "operator" liability under CERCLA is consistent with the analysis in *Bestfoods*.

NEITHER THE RECORD BELOW NOR THE COURT OF APPEALS' DECISION WARRANTS REVIEW BY THIS COURT.

A. Barlo properly was held not liable because as a matter of fact it neither controlled nor conducted any polluting activity at the site.

Critical aspects of the relevant lease relationships have been omitted from the Petition's recital of the facts. Barlo leased office space in 1964 in a small building located on a plot of land in Uniondale, New York, identified as Nassau County Section 44, Block D, Lot 7A. Barlo used the space for its business of selling and distributing equipment. Lot 7A was adjacent to Lot 7B (the "Site"). The Site housed twelve above-ground petroleum storage tanks and had been used for decades by Commander Oil or its predecessors for the loading, unloading and storage of fuel oil.

In 1969, Commander Oil leased the Site to Pasley Solvents and Chemicals, Inc. ("Pasley"). Pasley used the Site to repackage, store and dispose of solvents which were CERCLA hazardous substances. Commander Oil retained, *inter alia*, the right to use and in fact kept using the Site's three large vertical tanks holding 225,000 gallons of fuel oil.

In 1972, Commander Oil dictated a change in its lease arrangements with Pasley and Barlo. Commander Oil consolidated the leases. It leased both lots to Barlo in one contract, insisting that the Site, which Barlo had never used, be subleased to Pasley, so as to allow Pasley to continue to occupy and use Lot 7B. Accordingly, Barlo's 1972 five-year lease was expanded to include the Site,

expressly acknowledged Pasley's existing tenancy of the Site, and effectively foreclosed subleasing of the Site to anyone but Pasley by otherwise banning a lease to any fuel, fuel oil or oil business — the businesses most likely to have use for such a tank farm.

Barlo's first knowledge of any environmental problem at the Site did not come until fully 12 years after Commander Oil leased it to Pasley. Following earlier discovery of contamination on the Site, the United States Environmental Protection Agency ("EPA") in 1987 ordered Commander Oil to conduct a CERCLA Remedial Investigation and Feasibility Study of the Site to determine the extent of contamination and to develop a plan for remediation. In 1990, Commander Oil, having entered into a consent decree with the EPA under which it agreed to design and implement response actions and to reimburse the federal government for its past costs, demanded contribution or indemnification from Barlo and Pasley, among others, by commencing this lawsuit.

At trial, the District Court determined that the actions of Pasley and its principal Robert Pasley were the primary cause of the contamination and that they were "wholly responsible for introducing the contaminants to the Site," Pet. 86a. It also found Commander Oil had contributed, although less significantly, to the contamination, Pet. 31a. Critically, the District Court rejected operator liability for Barlo, specifically stating, "[w]ith respect to Barlo, the record is *barren of any evidence* to suggest that it actually contributed to the contamination of the Site," Pet. 86a (emphasis supplied). The Second Circuit agreed, *see* Pet. 21a, n.3.

The 1972 Commander Oil-Barlo agreement was a plain vanilla lease, largely written on a standard form, but which gave Barlo fewer and more limited rights than a lessee normally would have. The Court of Appeals enumerated the significant limitations on Barlo's bundle of rights:

> Barlo was, *inter alia*, (1) limited to using Lot 7A [not the Site], and only "for that business presently conducted by tenant on a portion of the same premises leased hereunder"; (2) required to obtain written consent from Commander Oil before making "any additions, alterations or improvements" on the land, which alterations would become Commander Oil's property in any event; (3) required to obtain written approval from Commander Oil to sublet the property, and prohibited from subletting to any entity that had "any connection with the fuel, fuel oil or oil business"; (4) required to obtain written permission from Commander Oil to display any "sign, advertisement, notice or other lettering" on the building; (5) required to keep the property "clean and in order to the satisfaction of" Commander Oil, and responsible for any damage Barlo itself caused to the premises or to the "systems or equipment or any installation therein"; and (6) prohibited from doing anything that would "in any way increase the rate of fire insurance" on the property, and from bringing or keeping upon the premises "any inflammable, combustible or explosive fluid, chemical or substance."

Pet. 19a-20a.

The Second Circuit observed that at the same time:

> Commander Oil retained many of the rights and obligations of ownership. Among other things, the fuel company: (1) reserved a right to enter onto the lot for various purposes; (2) reserved for its own use three oil storage tanks on lot 7B; (3) reserved an "option" to use, on written notice to Barlo, "certain office space" within lot 7A; (4) reserved the right to maintain "its aerial or a compatible aerial" on the roof of the building, and (6) [sic] assumed responsibility to make structural repairs.

Pet. 20a. The Court of Appeals, noting that "Barlo lacked most of the bundle of rights that comes with ownership of property," Pet. 21a, correctly concluded: "Whether or not Barlo was simply a rent conduit between Commander Oil and Pasley — as Barlo claims — it did not possess sufficient attributes of ownership over lot 7B [the Site]." Pet. 19a. On the record before it, the conclusion reached by the Court of Appeals that Barlo was not *de facto* the Site's owner was correct.

B. The rationale of the decision below presents no issue of general significance warranting review by this Court.

Contrary to Petitioner's suggestion, the Court of Appeals did not fashion a strict and categorical rule that lessees/ sublessors could never be liable as owners. Rather, the Court of Appeals observed that if control over the facility were made the sole gauge of ownership under CERCLA — the position urged by Commander Oil — then operator liability

would be transformed into a subset of owner liability. Since statutes should be interpreted to avoid redundancy, the Second Circuit held that site control *alone* is an improper basis for the imposition of "owner" liability. Therefore, it reasoned, a typical lessee should not be held liable as an owner unless its lease arrangement contained specific rights and responsibilities which rendered it a "*de facto* owner." On analysis, no facts supporting a finding of *de facto* ownership, as suggested by the Court in its opinion,[1] existed in Barlo's situation, Pet. 18a-21a.

But even were the Court to find the legal theory urged in Commander Oil's Petition persuasive, given the record below and the Second Circuit's holding that lessee liability as an "owner" is dependent on the specific facts of the case, review of this case would afford no opportunity for its application. Barlo lacked sufficient rights under its particular lease to be deemed a *de facto* owner or to control the Site.

Moreover, unlike the situation which existed before the grant of certiorari in *United States v. Bestfoods*, 524 U.S. 1 (1998), the construction of "owner" in a lessee/sublessor context is neither a frequently recurring issue nor one as to which the Courts of Appeal are in conflict.[2]

1. The Second Circuit's opinion expressly sets forth certain factors which might be considered: (1) the length of the lease and whether the owner retains rights as to how the property may be used; (2) whether the lease may be terminated by the owner; (3) whether the lessee has the right to sublet all or any part of the property without notifying the owner; (4) whether the owner or lessee is responsible for taxes and other costs; and (5) whether the lessee is responsible for making structural and other repairs, Pet. 18a.

2. This Court also recently denied certiorari on a *Bestfoods* issue, *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1832 (2000).

Commander Oil's Petition cites a handful of District Court decisions and two appellate court decisions rendered over a period of 15 years to suggest the existence of disagreement in the law. Neither Court of Appeals decision suggests even the slightest conflict with the Second Circuit's decision.[3] Furthermore, the District Court cases are easily distinguishable on their facts — as, for example, *Servco Pacific Inc. v. Dods*, No. 98-00272, 2000 WL 1048586 (D. Haw. July 12, 2000), where a *50-year* lease was involved. That decision cites the Second Circuit's discussion of circumstances not present in Barlo's case, such as the long duration of the lease, which might support treating a lessee as an owner, further underscoring that the opinion below did not conclusively foreclose owner liability for all lessees in all situations.

In the District Court decision in *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1985), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989), the actions of the lessee entity in question had entwined it utterly in the CERCLA liability scheme. The District Court found it liable under every possible CERCLA category — operator, arranger and transporter as well as owner. Because the lessee entity was so inextricably involved in operating the site, the District Court observed that it "stood in the shoes of the property owners," 653 F. Supp. at 1003. The lessee entity did not

3. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992), involved operator liability and was specifically disapproved by *Bestfoods*, 524 U.S. at 60 n.8. The Fourth Circuit decision in *United States v. Monsanto Co.*, 858 F.2d 160 (6th Cir. 1988), *cert denied*, 490 U.S. 1106 (1989), never addressed the owner issue.

appeal the lower court's decision nor did the Fourth Circuit's opinion discuss the "owner" issue.

The Second Circuit did not dispute that a party so enmeshed in the contaminating conduct should be held liable under the particular circumstances. Rather, its opinion observed expressly that "if the lessee is the active user and polluter of the property, imposition of CERCLA liability [as an operator] seems particularly appropriate," Pet. 12a. It cautioned, however, that "imposing *owner* liability instead of *operator* liability threatens to conflate two statutorily distinct categories of potentially responsible parties," Pet. 13a (emphasis in original), and suggested factors to be considered in avoiding this pitfall.

Similarly, in *United States v. A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317 (S.D.N.Y. 1992), a bank had exercised responsibility for maintenance and repair of the property in issue, had made repairs related to the cause of contamination, had an officer specifically responsible for environmental matters and had conducted an environmental investigation of the property, *id.* at 1333. By contrast, Barlo had no involvement with Pasley's daily Site operations nor did it inspect or maintain Pasley's facilities.

In *Burlington Northern Railroad Co. v. Woods Industries, Inc.*, 815 F. Supp. 1384, 1391 (E.D. Wash. 1993), where "arranger" liability also was found, the lessee had in fact exercised "control over the use of the property" by ordering the demolition of a building containing pesticides and conducting fruit-washing operations which also produced pesticide contaminants. In *Louisiana v. Braselman Corp.*, 78 F. Supp. 2d 543 (E.D. La. 1999), a direct government cost recovery action, the successor railroad was held liable

because its predecessor not only had leased but also had built the creosote works which contaminated the bayou. Additionally, the railroad was found to be a CERCLA facility owner by virtue of its ownership of tracks and other tangible property under a series of trackage indentures lasting up to 70 years.

Finally, in *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 259 (S.D.N.Y. 1999), "owner" liability was rejected because the town, like Barlo, "had no involvement with the Site's day-to-day management." In short, none of these decisions can be said to be in real conflict with the Second Circuit's decision.

C. The decision below is consistent with *Bestfoods* and review is not required to reconcile the law.

The result reached by the Court of Appeals was consistent with this Court's *Bestfoods* decision. Indeed, the Second Circuit expressly adopted the interpretive approach of *Bestfoods*, Pet. 10a, and the result below is true to the reasoning of *Bestfoods*.[4]

Bestfoods focused the inquiry in the "operator" context on the factual relationship between the pollution and the

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4. It is somewhat surprising that Commander Oil now presents *Bestfoods* as central to its Petition. In the District Court, Commander Oil urged and the District Court concluded that Barlo's reliance on *Bestfoods* was "misplaced: that case concerned the question of liability in the parent-subsidiary context whereas the instant case concerns the question of liability in the landlord-tenant and owner-operator context," Pet. 27a. Similarly, in the Court of Appeals, Commander Oil characterized Barlo's reliance on *Bestfoods* as "fallaciousness."

parent entity, rejecting the notion that the parent's control of a subsidiary, without more, warranted liability. The Second Circuit focused the inquiry in the "owner" context on the relational nexus between the actual owner and the lessee, rejecting the argument that nominal status as a sublessor, without more, warranted liability. Commander Oil does not claim that any of Barlo's conduct caused the pollution; instead, it argues that Barlo should be held responsible because it did not act. The significance of the inaction can have meaning only in the context of Barlo's lease rights. Here, where its rights were severely limited, halting well short of *de facto* ownership, such inaction had no meaning.

The Petition is an invitation to read into a complex statute a form of status liability concededly not provided for on its face. There is no confusion which has been engendered by the Second Circuit's decision, nor does the decision undermine the rigor of CERCLA's liability scheme. Lessees who truly stand in the shoes of the owner cannot expect to escape CERCLA responsibility. In the instant case, an owner and operator (Commander Oil) and two operators and transporters (Pasley and Robert Pasley) were held liable, while a party found to have made no contribution to the contamination and which did not stand in the shoes of the owner (Barlo) was held not liable. The critical lesson likely to be drawn by courts and practitioners from the Second Circuit's decision is only that the specific nature of the relationship between a title owner and lessee must be examined carefully when evaluating a claim of "owner" liability under CERCLA.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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FILED
OCT 17 2000
OFFICE OF THE CLERK

(3)

No. 00-373

IN THE

Supreme Court of the United States

COMMANDER OIL CORP.,

Petitioner,

v.

BARLO EQUIPMENT CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

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PRELIMINARY STATEMENT

In this Reply Brief, Petitioner, Commander Oil Corp. ("Commander") will demonstrate that this case presents an issue of critical significance, warranting review by this Court.

I.

REVIEW BY THIS COURT IS WARRANTED IN ORDER TO ACHIEVE CONSISTENCY AMONG THE COURTS REGARDING "OWNER/OPERATOR" LIABILITY UNDER CERCLA

A. Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") has been praised as one of the most significant Congressional enactments of the 20th Century. Conversely, it has also received much criticism due to its "miasmatic provisions." (Second Circuit Opinion herein, Pet. App., page 7a). In 1998, the Supreme Court in *United States v. BestFoods* ("*BestFoods*") 524 U.S. 51 (1998), was compelled to review CERCLA in the context of "operator" liability, and the Court resolved nationwide confusion by rendering a bright-line test with respect to corporate parents whose subsidiaries "operate" contaminated sites. It is respectfully submitted that a similar clarification is needed today in the context of "owner" liability.

Prior to the Second Circuit's holding in this case, the general consensus among federal courts was that "owner" liability could be imposed upon tenants who had some degree of control over the activities of their subtenants at a site.

See, e.g., Delaney v. Town of Carmel, 55 F. Supp. 2d 237, 258-59 (S.D.N.Y. 1999); *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1332-34 (S.D.N.Y. 1992); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1002-03 (D.S.C. 1984), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). The Second Circuit singularly diverged from this consensus in holding that a tenant/sublandlord, "whose control over the Site was complete" (*See*, District Court Opinion herein, Pet. App., page 56a), is not liable as an "owner" under the statute. Rather than adding clarity and precision to the statute, the Second Circuit's divergence has expanded the "miasmatic" confusion surrounding the implementation of CERCLA.

Furthermore, review by this Court is required to effectuate the statute's remedial purpose. Since its enactment, CERCLA's provisions have been liberally construed in order to assure that liability attaches to all persons potentially responsible for environmental contamination. If the Second Circuit's decision remains the controlling authority on this issue, an entire subset of potentially responsible parties will be exempt from the statute's provisions. The Second Circuit's decision shields tenants, cloaked in the guise of ownership and reaping the monetary benefits thereof, from any liability for environmental contamination occurring on their watch.

B. Judicial Guidance is Needed among Federal Courts to Ensure a Consistent Test for "Owner" Liability under CERCLA.

In rejecting other federal courts' determinations that "owner" liability could be imposed on persons possessing the requisite degree of control over a facility, the Second

Circuit reasoned that imposing "owner" liability on such parties would "conflate two statutorily distinct categories of potentially responsible parties." (Second Circuit Opinion, Pet. App., page 13a). The confusion lies, not in the clear language of the statute, but rather in the Second Circuit's application of it.

The terms "owner" and "operator" are not defined as "statutorily distinct categories." On the contrary, the term "owner or operator" is defined as a unit, as follows:

> (i) in the case of a vessel, any person owing, operating, or charting by demise, such vessel, (ii) in the case of a onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment or similar means to a unit of state or local government, any person who owned, operated, or otherwise *controlled* activities at such facility immediately before hand. Such term does not include a person, who, without participating in the management of a vessel or facility holds indicia of ownership primarily to protect his security interest in the vessel or facility. 42 U.S.C. § 9601 *et seq*. (emphasis added).

As evidenced by the statute, the term "owner or operator" is not only defined as a unit, but it also expressly implicates *control* in determining whether a person is an "owner or operator" for the purposes of the statute. 42 U.S.C. § 9601(iii) (defining "owner or operator" in the case of any facility, conveyed through bankruptcy, as "any person who owned,

operated, or otherwise *controlled* activities at such facility . . ."). Thus, the Second Circuit's rejection of site *control* as a basis for "owner" liability under CERCLA is not only inconsistent with the *BestFoods* analysis, but is, more importantly, inconsistent with the express terms of the statute.

Prior to the Second Circuit's determination, the majority of federal courts which had addressed the issue, correctly found that the requisite degree of control over a facility is not strictly limited to consideration of "operator" liability, but is similarly applicable in the context of "owner" liability. *See, e.g., A&N Cleaners and Launderers, Inc.*, 788 F. Supp. at 1332-33; *Nurad v. William E. Hooper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992); *South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. at 1003 (D.S.C. 1985), *aff'd sub nom. in part, vacated in part, United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). The requisite degree of Barlo's control herein, sufficient to impose "owner" liability, was established following eight years of litigation, including a four-day bench trial.

At trial, Judge Mishler noted that

> the undisputed facts established that Barlo held itself to be the landlord of the site, had *control* over the use of the land made subject of the lease, and enjoyed the benefits of ownership and control of the site for the full term of Pasley's subtenancy. Pasley looked to Barlo as its landlord, at one point requesting permission from Barlo to build the berm concrete storage area. Aside from two restrictions contained in the Barlo lease, one in which Barlo agreed not to rent any portion of the

> premises to anyone having "any connection with the fuel, fuel oil, or oil business", and a second which "preserved Commander's right to a certain portion of the site containing three oil storage tanks," Barlo's control over the site was *complete*. Neither of these restrictions mitigated Barlo's authority and control over the site as a lessee/ sublessor. Commander has therefore made out a *prima facie* case of CERCLA liability, and Barlo is liable for costs incurred as a result of the contamination of the site.

(District Court Opinion, Pet. App., page 55a-56a).

Based on these facts Judge Mishler concluded that: (a) Barlo had the right and the duty to control any contaminating activities of its subtenant Pasley; and (b) neglected that duty and allowed the contamination to take place under its very nose without the kind of intervention that the law expects from the owner of the property.

Without a finding that Judge Mishler's factual determination was clearly erroneous, the Second Circuit nevertheless reversed, on the law, vitiating any duty on the part of tenants/sublandlords, standing in the shoes of an owner, to prevent or respond to environmental contamination at a facility. It thus becomes necessary for this court to set forth an appropriate test, as it did in *BestFoods*, to assure that tenants/sublandlords such as Barlo, possessing actual control over their subtenants' sites, are appropriately labeled potentially responsible parties under the statute.

C. Supreme Court Review of this Issue is Necessary to Fill Gaps Created by the Second Circuit's Determination which Essentially Exempts Tenants/ Sublandlords from CERCLA's Provisions.

It is well settled that CERCLA should be liberally construed in order to effectuate its remedial purpose. (Second Circuit Opinion, Pet. App., page 9a). Instead of applying a liberal construction, the Second Circuit asserted that the strict liability concept of CERCLA should be a "narrowly tailored tool capturing a specific kind of responsibility." (Second Circuit Opinion, Pet. App., page 15a). Regardless, requiring a tenant to assume responsibility for environmental contamination of a sublessee requires neither a liberal nor narrow construction of CERCLA's liability scheme. All that is required is consistent application of the term "owner and operator" as defined by the statute, and a finding that the test set forth in *BestFoods* is similarly applicable to tenants who, although not fee owners of property, have the requisite degree of control over a facility.

The Second Circuit's determination exempts from liability tenants/sublandlords who permit contamination to take place under their very noses. Just as an executor is liable to an estate for damages incurred for failure to take action while a co-executor wastes a testator's assets, a tenant similarly should not be permitted to avoid liability when it stands in the shoes of an owner and possesses a significant degree of responsibility over a site. To hold otherwise permits tenants/sublandlords to ignore the activities of their subtenants and avoid liability under the statute. Such a result could never have been intended by the statute.

In *BestFoods*, the Supreme Court set forth a uniform rule for finding parent corporations liable under the statute by imposing an "actual control" test with regard to the subject facility. Here, the relationship between tenant/sublandord and subtenant is much more intertwined. We are not asking the federal courts to expand the provisions of the statute but rather to clarify that the actual control test set forth in *BestFoods* is applicable to "owners" as well.

In finding that Barlo did not posses the "bundle of rights that comes with ownership of property" (without finding the lower court's opposite determination to be clearly erroneous), the Second Circuit noted its reluctance to surprise Barlo and other tenants with new and unexpected liability. The only element of surprise is that which emerged from the Second Circuit's determination in contravention of the majority of federal courts which have addressed the issue. *See, e.g., United States v. A&N Cleaners and Launders, Inc.*, 788 F. Supp. 1317, 1332-33 (S.D.N.Y. 1992); *Nurad v. William E. Hooper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1985), *aff'd sub. nom. in part, vacated in part, United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). The general consensus established by the majority of federal courts regarding the issue already had placed tenants on notice of their potential for environmental contamination at a site.

It thus is necessary for this Court to clarify whether tenants should, or should not, be concerned about their potential liability for environmental contamination on site. We respectfully submit that the former must be true in order to effectuate CERCLA's broad remedial purpose.

D. The Statute's Remedial Purpose is Effectively Carried Out by Assimilating Tenants and Prospective Buyers Rather Than Distinguishing Them.

In reaching its determination, the Second Circuit also opined that a buyer and future owner in fee of the property would be more likely to evaluate the environmental condition of a facility before going ahead with a transaction. Even if this assumption were true (and there is no basis for it), the statute's purpose in alerting prospective buyers to environmental issues on the property is to prevent owners from asserting an ignorance defense in CERCLA proceedings. It follows that tenants who retain a certain level of control over the property should have the same concerns as a fee owner in the property in order to prevent contamination at a site.

Thus, a tenant should not be distinguished from a potential buyer. Rather, a similarity should be drawn between the two wherein a similar onus is placed on tenants/ sublandlords requiring them to be concerned about contamination — not to ignore it while reaping monetary benefits through unencumbered use of contaminated property.

CONCLUSION

The attention of this Court is necessary to clarify the appropriate test for "owner" liability under CERCLA and to ensure that its remedial purpose remains unencumbered. CERCLA's statutory text makes it clear that "owners or operators," as defined, are to be treated similarly: not as two "statutorily distinct categories of potentially responsible parties." It follows from *BestFoods* that "actual control" over

a site should dictate "owner or operator" liability. The Second Circuit's refusal to consider "actual control" in establishing "owner or operator" liability contradicts this Court's holding in *BestFoods* and ignores the plain language of the statute.

The Second Circuit's determination confuses an issue which was previously clarified by the majority of federal courts, thus making it impossible for tenants possessing a certain degree of control over a facility to establish whether they will, or will not, be liable for ignoring contamination on site. We again submit that the former must be true in order to maintain consistency throughout the judiciary and to effectuate the statute's broad remedial purpose. To hold otherwise, permits an entire subset of potentially responsible parties to profit from environmental ignorance and stunts CERCLA's broad remedial purpose.

For all the above reasons, it is respectfully requested that this Court grant Commander's Petition for Writ of Certiorari.

Respectfully submitted,

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